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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TOMMY JACKSON NICHOLS et al., Defendants and Appellants.	F055572 (Super. Ct. Nos. 1038145, 1037967, 1037386) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Donald E. Shaver, Judge.

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant Tommy Jackson Nichols.

Victor J. Morse, under appointment by the Court of appeal, for Defendant and Appellant Kevin Laquan Trice.

Charles M. Bonneau, under appointment by the court of Appeal, for Defendant and Appellant Michael Jermaine Dean.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellants Tommy Jackson Nichols, Jermaine Michael Dean, and Kevin Laquan Trice were charged, by consolidated amended information, with premeditated murder perpetrated, during the commission of a robbery, by an active participant in a criminal street gang to further the activities of that gang, and involving the personal use and discharge of a firearm (count I – Pen. Code,[1] §§ 187, 190.2, subd. (a)(17) & (22), 12022.5, subd. (a), 12022.53, subds. (b), (c), (d) & (e)(1)); kidnapping, involving the personal use and discharge of a firearm (count II – §§ 207, subd. (a), 12022.5, subd. (a), 12022.53, subds. (b), (c), (d) & (e)(1)); residential robbery, involving the personal use and discharge of a firearm (counts III & IV – §§ 212.5, 12022.5, subd. (a), 12022.53, subds. (b), (c), (d) & (e)(1)); and false imprisonment, involving the personal use of a firearm (count V – §§ 236, 12022.5, subd. (a); count VI – §§ 236, 12022.5, subd. (a), 12022.53, subd. (b)). Each crime was alleged to have been committed for the benefit of, at the direction of, or in association with the Pasadena Denver Lane Bloods, a criminal street gang (§ 186.22, subd. (b)(1)). Trice was further alleged to have suffered three prior serious felony convictions that were also strikes (§§ 667, subds. (a) & (d)), while Nichols was alleged to have suffered two prior serious felony convictions that were also strikes (§§ 667, subds. (a) & (d)) and to have served three prior prison terms (§ 667.5, subd. (b)).[2]

The matter initially proceeded as a capital case, but the People ultimately decided not to continue to seek the death penalty. During the ensuing jury trial, count II, as well as count I's premeditation allegation and street gang special circumstance, were dismissed. The jury subsequently convicted appellants of first degree murder and all remaining charges, and found the nonrecidivist allegations to be true. Following a

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1 All statutory references are to the Penal Code unless otherwise stated.

2 Bobby Blueford was charged with appellants, but his case was severed for trial and is not before us on this appeal.

bifurcated court trial, the prior conviction and prison term allegations were found true as to Nichols and not proven as to Trice.

Appellants each filed a motion for new trial. Following an evidentiary hearing, the trial court ordered all gang enhancements stricken, but otherwise denied the motions. Each appellant was sentenced to life in prison without the possibility of parole plus determinate and indeterminate terms, and was ordered to pay restitution and a restitution fine. All filed timely notices of appeal and now raise numerous claims of error. For the reasons that follow, we will modify the judgments as to Trice and Dean by striking the restitution order to the City of Modesto, but otherwise affirm. As to Nichols, we will reverse the section 12022.53, subdivision (c) and (d) enhancements for insufficient evidence, strike the restitution order to the City of Modesto, and remand the matter for resentencing, but otherwise affirm.

FACTS

I

PROSECUTION EVIDENCE

The Homicide and Investigation

In March 2002, T. and Jose "JoJo" Ruiz lived with their two children, eight-year-old R. and five-year-old E., in a house on Montilla Lane, a small cul-de-sac in Modesto.[3] Ruiz was known to police as a member of the West Side Boyz, a Norteno gang. He was also known as one of the major distributors of base cocaine in west Modesto, and federal authorities planned to serve a search warrant on his residence within a matter of days. In the year or so before the events of this case, Ruiz regularly bought cocaine by the kilo, cooked the cocaine and turned it into rock form, and then sold the product mostly by the ounce. According to T., Ruiz did not sell drugs from their residence or keep more than

[3] For the sake of clarity, T. Ruiz and the children will be referred to by their first names, while Jose Ruiz will be referred to as "Ruiz." No disrespect is intended.

small amounts of cocaine there, although he sometimes prepared, cooked, or packaged the drugs at the house. During the time period, he sometimes had large sums of cash hidden in different parts of the house. There was a safe with an electronic lock in the master bedroom closet. Ruiz usually did not keep any money there, however; instead, he kept a Taurus nine-millimeter semiautomatic pistol in the safe for protection.

Phillip Collins and Ruiz had known each other since about the third grade and, at the time of Ruiz's death, were, according to Collins, "pretty much best friends." T. was acquainted with Collins and was aware that he and Ruiz were in the drug business together. T. felt Collins could potentially be a backstabber to Ruiz.

In July 2000, Collins, having twice sold crack cocaine to an undercover officer and informant, was given the option of getting eight to 10 years in prison or turning in his friend. He chose to turn in his friend and, to that end, signed a contract with the Modesto Police Department that was approved by the district attorney's office. Pursuant to the agreement, Collins was required to buy drugs from Ruiz, Ruiz's brother Javier Ruiz, and another individual in controlled settings, and to testify as needed, in return for which he would plead guilty to one count of selling drugs, and be sentenced to local time and three years' probation. He was required to obey all laws and make all court appearances, and to keep Modesto Police Sergeant Helton advised of his residence and whereabouts. Helton would contact Collins when a purchase was to be made, then tell him from whom to make the buy. Collins would then arrange the deal, buy the drugs, and give the drugs to the police. He was wired for sound during the transactions, and the police gave him money to make the purchases.

Under the supervision of Helton and FBI Agent Tim Hammond, Collins made

approximately 20 controlled buys from Ruiz or his associates.[4] The quantities purchased ranged from an ounce to a quarter kilo. Helton considered Collins very reliable and one of the better informants with whom Helton had worked. Federal grand jury indictments were obtained in February 2002, and served in March, with the prosecution of Ruiz's associates concluding in late spring 2003, when they all pled guilty in federal court.[5] According to Helton, Collins would not have been privy to the status of the investigation and would not have been told when arrests and indictments were imminent. He was not to receive any consideration for his participation in the case concerning the Ruiz homicide. Ultimately, Collins never pled guilty to anything or served time in jail, and was told he would not be prosecuted on his case.[6]

In 2002, Collins was acquainted with Trice (known to him as Roach), knew of Nichols (known as Bam or Bam Bam), and came into contact with Dean (known as J Dogg). Collins, who had suffered two felony convictions prior to 2002 and been sent to the California Rehabilitation Center (CRC) for one, had gotten to know Trice during the 13 months both were at CRC. During the time Collins was at CRC, Blood, Crip, and Sureno gang members were there. The Bloods wore red and the Crips wore blue. Trice, who was from the Pasadena Denver Lane Bloods (PDL) and had "Pasadena" and "DL" tattoos, mostly associated with those wearing red, and Collins saw him "throw[]" a Blood sign with his hands. Bobby Blueford was also in CRC with Collins and Trice.

As CRC's inmates were all there for drug offenses, they sometimes bragged about

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4 Collins did not have any federal charges pending, but instead was paid money by the federal agents. Helton contacted the FBI in the fall of 2000; they were interested in pursuing the case against Ruiz.

5 No indictment was requested or issued against T. The only time Helton saw her involved in criminal activity was during a surveillance of Ruiz in 1997, when Helton observed what he thought was a drug transaction in which T. drove the car.

6 According to Helton, the statute of limitations ran in June or July 2003.

the drug crimes they committed or the great connections they had. Collins did so with PDL members. He let Trice and Blueford know that if they were ever in his area, he had a good drug connection in Modesto. He probably told them that he had his main connection, and that the person was his Mexican partner.[7] He also probably talked about the quality of the drugs the man had, that the man was able to get as much as they wanted or needed, and that he would sell it to Collins for a fair price. Collins was talking about Ruiz, but he did not believe he ever mentioned the name to any of the PDL members.

While in CRC, Collins and Trice associated on a daily basis. After they got out of CRC, they ran into each other in Merced, where Trice had family. This was a couple of years before Ruiz was killed. Collins observed Trice making hand-to-hand drug sales. Whenever Trice was coming to Merced from Pasadena, he would give Collins a call and they would get together.

The week before the weekend of Ruiz's murder, Trice called Collins at Collins's home in Atwater and said he was coming down for the weekend and would call when he got into town. Trice came by Collins's house sometime on Friday. Blueford, Dean, and Nichols were with him. They arrived in a silver Lincoln Town Car. The car looked new, and one of them said it was a rental. After some general conversation, the topic turned to drugs. Collins mostly spoke with Trice, who wanted to know how and where to get a quarter kilo of rock cocaine. Trice asked Collins several times that day to hook him up with someone who had that much.[8] Trice asked Collins if Collins could hook them up with Collins's "Mexican homeboy," the connection about whom Collins had talked while in CRC. Trice kept asking when they could go get it and how much it would cost.

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[7] Collins could not recall with certainty whether he talked about this, as his time in CRC with Trice and Blueford was in 1995. He testified at trail in 2007.

[8] Blueford and Trice stayed at Collins's residence the whole day. Dean and Nichols were there off and on, as they knew someone who lived nearby.

Collins knew that under the terms of his contract with the police department, the whole deal could be off if he broke the law or sold drugs, so he knew he could not set up the contact. He told Trice he would hook them (appellants and Blueford) up and to give him a call the next day or the day after, but he was just playing Trice. He was drinking at the time, however, and told appellants and Blueford that his connection had a lot of drugs stashed and a lot of money, and the kind and color of his car.[9] Helton had contact with Collins late Friday morning; Collins said nothing about knowing of people who were trying to make buys from Ruiz, even though he was under an obligation to notify Helton anytime there was a possible sale of drugs involving Ruiz. Likewise, Collins did not contact Hammond, his federal handler, although he knew Hammond would be very interested.

Berenice Sanchez lived on Hasley Drive, across the street from the Ruiz home. One or two days before Sunday, March 3, a black, lowered Chevrolet pickup truck drove slowly by and then stopped briefly on Hasley. Its two occupants looked at the Ruiz house. A little while later, another vehicle – a newer, possibly four-door, light-colored or grayish or white Lincoln with tinted windows – did the same thing, although this one stopped around the corner.[10] This was odd, because usually someone turning into the

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[9] According to Collins, he was not familiar with the address at which Ruiz lived at the time. He denied telling an investigator from the Department of Justice that appellants had come to do a "lick," i.e., a robbery. Collins was aware that the influx of money from the FBI would end when Ruiz was arrested. He was not informed that it was about over, but he had made some large buys lately and knew it was near the end from the way things were progressing. Collins had had no discussion with anyone in law enforcement about what was going to happen once Ruiz was arrested and Collins's identity was revealed. He assumed he would be provided for, however.

[10] When interviewed on the night of the shooting, Sanchez described the vehicle as a white car, with tinted windows, possibly a newer Lincoln, seen approximately two days earlier. She was unsure if it was a two-door or a four-door vehicle, or if it was related to the shooting.

cul-de-sac by mistake would just drive on around in a U-turn and go back out.

On Saturday, Collins was at a wedding, but caller identification records on his phone showed that Trice called several times during the day. Collins called him back at least once and said he was busy that day and would call Trice back. Trice was calling too much, "bugging" Collins about drug sales. Collins did not know whether Trice called on Sunday; it was Collins's daughter's birthday, and Collins was away from home all day.

Around 8:00 p.m. on Sunday, March 3, T., R., and E. had dinner. Ruiz, who had been receiving a lot of calls on his cell phone before he went out for a while, was not home, although T. telephoned him during dinner and asked him to bring something from the market. After the meal, the children went to the bathroom to take a bath. About 15 minutes after she had talked to Ruiz, T. was cleaning up in the kitchen when she heard the front door open and close. There was a moment of silence, then T. heard Ruiz call her name in an urgent tone of voice and tell her to get down. She turned to look and saw him on the ground between the entryway and the kitchen. Two people were holding him by the back of his shirt and pointing guns at him. One was Dean. Another person – Trice – came around the corner with a black revolver pointed at T. and told her to get down. Nichols was the third person she saw. He was holding a black gun that was the biggest of the guns she saw. He pointed it at Ruiz.

T. got down on the floor, but was still looking at the intruders. She and Ruiz both started begging them not to let the children see what was happening. One or more of the intruders were telling them to put their heads down and not look at them. T. was still looking at Trice, and he told her, "'Bitch, put your head down.'" When she objected to him calling her a bitch, he said it again and jabbed the gun toward her eye and told her again to put her head down. At some point during this time, one or more of the intruders said something to the effect that they just wanted the stash. T. interpreted this to mean they wanted money or drugs.

Dean told Trice to take T. to find the children. Trice walked her out of the kitchen

and through the dining room. For reasons unknown to her, there was a pause, during which she stood in the dining area, between the dining and the living room area, for a moment. She saw someone walking down the stairs from the entryway.[11] Another person was standing in the dining area. At this point, she believed there were four intruders, total, in the house.[12] One or two were wearing a black beanie or cap with a red emblem on it. The hair that was not covered was either curls or braids. The other two were bare-headed and their hair was also either in braids or curls. Dean had the longest hair.

Up until this point, Trice had been watching over T. At some point, there was a transition in who was watching her. She thought it might have occurred during the pause, but was not certain. T. believed Trice then went toward Ruiz, but she did not see what he did. At some point, she saw Nichols direct the gun at Ruiz.

Meanwhile, the children had disrobed but, before they could bathe, E. told R. that their father's friends were there. R. went to see who they were. She saw around three African-American men coming through the door. The intruders were wearing black clothing and some were wearing beanies. One of the men had black hair done in shoulder-length braids. His face was skinny or bony, his nose was long and pointy, and his teeth protruded from his mouth. R. subsequently identified this man, through a photographic lineup and at trial, as Dean.

R. went back into the bathroom. She and E. were about to get into the bathtub when Dean entered the bedroom. He did not say or do anything, but went back out and

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11 It is unclear from T.'s testimony whether this was Nichols and, if so, whether this was the first time she was him.

12 All of the people T. saw in the house were armed at one time or another. At trial, she identified appellants as three of the intruders. She testified at the preliminary hearing of the fourth intruder, who was not present at trial. She did not see Collins the night of the incident.

then returned with T. He had a gun to the back of T.'s head and was holding one or both of her arms behind her back. He told her to get clothes for the children, so she and he left the room and returned with clothing that had been in the laundry room. T., who was acting rushed, got the children dressed.

According to T., the man who was with her at this time – Dean – was the person who was in charge of her after the transition. He was with her the entire time she was in the bathroom. At one point, he took his eyes off her and started looking around the bedroom. There was some jewelry on a dresser on the other side of the room, and he walked toward it.[13] T.'s purse was on the bed. Thinking it contained her cell phone, she went to grab it, but Dean saw her, pointed the gun at her, and told her to put the purse down. She threw the purse back onto the bed. She later discovered that her cell phone was missing. She could not recall if she recovered it.

Around this time, Trice and Nichols, who was wearing a light blue shirt, forced Ruiz to walk through the bedroom to the walk-in closet. Both had guns. The closet door opened inward into the closet; the safe was behind the door. The closet door was half open, and T. could see the back of Nichols's light blue shirt. She then heard gunshots, probably at least three initially. She started screaming, "'No,'" and saw Dean go to the closet door and start shooting inside the closet at a downward angle. He fired a few shots, then paused. T. witnessed at least four shots going into the closet door. There were other shots still going off behind the door. She was screaming and crying and wanting to save the children, so she ran to the bathroom, opened the window and broke off the screen, then boosted R. up so she could climb out the window, and told her to run to the neighbor's house and tell them to call 911. T. then tried to pick E. up and put him

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[13] Ruiz owned a Rolex watch that was missing after the incident. T. could not recall whether the watch was among the jewelry on the dresser. No such watch was found in the subsequent searches of appellants' residences.

through the window, but he was screaming and so scared that he would not let her push him out. She told him to stay where he was, and by this time, the gunshots had stopped. T. believed she heard between five and 10 shots.

Meanwhile, as R. was running to the neighbor's house, she saw two of the intruders trying to leave by going over the chain-link fence next to the Ruiz house. One said to the other – Dean – that they had to get out of there, then he said a name that started with either R-A or R-O. Another intruder ran out of the garage, and Ruiz crawled out of the house like he was chasing the man. R. did not stop to look at him, but kept running to the neighbor's house across the street. When the woman answered the door, R. said she thought her dad got shot, and then they called the police.

After the gunshots stopped, T. walked into the bedroom and did not see anyone. She then walked to the closet, but did not see anyone there, either. There was blood everywhere, however, and Ruiz's gun was on the closet floor. Although it appeared to have malfunctioned, she grabbed it anyway and followed the blood trail through the bedroom, down the hallway, and into the garage. She saw Ruiz on his hands and knees and ran out to him. He was spitting out blood and gasping for air. T. was screaming and told him to hang on, then ran back inside to get E. and a phone. She was talking to the 911 operator when she got back to Ruiz, and when she saw he was already lying still, she threw down the phone and rolled him onto his back. When a neighbor ran over to see what had happened, T. screamed that Ruiz had been shot. She then began performing CPR.

Modesto police were dispatched to the Ruiz residence at approximately 8:14 p.m. They arrived within minutes to find Ruiz down in the driveway, with a Taurus nine-millimeter semiautomatic handgun lying next to him. The gun, which had a 15-round magazine in it, appeared to have malfunctioned, as the slide was partially back and a

round was sticking out of the ejection port.[14] T. was performing CPR on Ruiz, who had been shot and was bleeding profusely. Blood was trailing from him down the driveway, and it appeared that someone had made tracks through it. There was an odor of freshly burnt gunpowder in the house.

Modesto Police Officer Garcia spoke to T. at the scene. She described one of the perpetrators (none of whom she could identify by name) as a Black male adult in his mid- to late 20's, five feet seven inches and 170 pounds, and wearing a black beanie cap with hair sticking out of it. She said he was light-skinned and had a rough complexion, and horse teeth with big lips. He was wearing a black shirt or sweatshirt. She said this person shot into the closet door. She described a second perpetrator as a Black male adult in his early 30's, five feet eight inches tall and 230 pounds, with black hair in Jeri curls or braids, possibly collar-length. He was light-skinned and had a chubby, round face, and was wearing a blue jersey and possibly blue jeans. She said he walked into the dining room when the suspects came into the home. T. described the third perpetrator as a Black male adult in his mid- to late 20's, five feet nine inches tall and approximately 170 pounds, with short black hair and dark skin. She said he was wearing a black sweatshirt and was armed with a handgun, and that he pointed a gun in her face in the kitchen. The fourth perpetrator was a Black male adult in his late 20's or early 30's. T. had no further description of him. She informed Garcia that after she put R. out the bathroom window, she saw the man who shot into the closet walk northbound past that window.[15]

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[14] It was subsequently determined that the unfired cartridge that was wedged in the chamber was a .40-caliber round, which, although capable of being loaded into the magazine, was too large for the gun barrel. The remaining 13 unexpended cartridges in the magazine were the correct size.

[15] T. also described the perpetrators to Detective Blake when he interviewed her at the police station early on the morning of March 4. A tape recording of the interview was played for the jury.

Police searched the area in and around the Ruiz home shortly after the shooting. Entry to the house did not appear to have been forced; the front door was partially open and a set of keys was in the lock. In the hallway that led from the garage into the house and ultimately to the master bedroom, officers found two aluminum-colored CCI brand .380-caliber shell casings, bloodstains, and bloody handprints on the carpet. Inside the master bedroom itself were three more of the expended .380 shell casings. There were also bullet holes in various places in the room, and several expended copper-jacketed bullets were recovered. From the four bullet holes in the door of the master bedroom closet and associated gunshot residue, it was possible to ascertain that those shots were fired from the outside of the closet door inward. All four were fired in a downward, almost 45-degree angle. In the closet was an expended nine-millimeter shell casing that was believed to have been associated with the gun found by Ruiz's body. Also in the closet was a small safe with an electronic lock. The door was open and some of the contents were spilled out onto the floor. The trajectory of the bullets shot through the closet door was toward the general area of the safe. There were bloodstains in various places in the room. There was also blood in the closet, although not a lot. Bloodstain samples taken from the master bedroom were Ruiz's blood. The blood evidence essentially traveled a path from the master bedroom closet, through the area of the foot of the bed, down the hallway, to the garage, and to where Ruiz's body was located. Two dressers in the room contained cash in the amounts of $8,083 and $8,400. A box of .40-caliber ammunition was found in the master bedroom. It was the only box of ammunition found in the house. The box, which should have contained fifty .40-caliber rounds, contained forty-nine .40-caliber cartridges and one 9-millimeter round.

On the living room floor was a red-and-black knit cap with "California" embroidered on the front. It seemed out of place, since the rest of the house was fairly neat. On the floor of the dining room were a Nokia cell phone in its holder and four plastic zip ties that also seemed out of place.

The screen on the window of the master bedroom's bathroom was partially torn. Three shampoo bottles were on the ground underneath the window. A trail of items that appeared to have been taken from the house led to a hole that had recently been cut in the chain-link fence on the property line. Additional items and footprints led in a northerly direction. In a field directly north of the Ruiz residence, close to Woodland Avenue, officers located a black High Standard .22-caliber nine-shot rimfire revolver. At trial, T. identified this gun as looking similar to the one Trice pointed at her. Ruiz's blood was on the gun's cylinder. Footprint impressions in the grass and weeds indicated someone had recently run across the corner of the property. The direction of the footprints was northwest, toward Bennett Lane. A black-colored Sturm Ruger .357 Magnum revolver containing six expended shell casings was found underneath a bush in the front yard of a house on Bennett. The lack of condensation, cobwebs, and dust on the gun indicated it had not been there long. At trial, T. identified this gun as looking like the one the fourth intruder (who was not present at trial) had. The trail of evidence was consistent with a getaway car being parked about a block from the Ruiz house.

Detective Brocchini went to the crime scene on the night of the shooting and spoke to Andre Ruiz. Andre Ruiz related that a neighbor said he heard the shooting, then saw an older Black male adult with a short Afro haircut, in an orange, primered minivan, begin to honk his horn. The neighbor said he then saw two Black subjects run from the area around the Ruiz residence to the minivan, and then the minivan drove off. The neighbor also mentioned something about a black or new Lexus. Brocchini's attempts to track down the person who actually made the statements were unsuccessful.

Meanwhile, according to Collins, he returned home sometime after dark on Sunday. He and his wife were relaxing when they heard a bang on the door. Nichols and Dean were there. Nichols said something to the effect that Trice had been shot crossing the street across from the gas station near Collins's house. They said they had dropped him off down the street at some girl's house. Dean said they could not leave their

homeboy and asked how to get to the freeway. Collins gave him directions. Nichols, the more aggressive of the two, told Collins that they knew where he lived, and that if anyone came by asking questions, Collins was to say Trice got shot crossing the street. Collins could see the handle of a pistol tucked in the front of Nichols's pants. Nichols and Dean were at Collins's house for about 10 to 20 minutes, then left. Collins could not tell whether anyone else was in their car. While they were there, Helton telephoned with the news that Ruiz had been shot.

Helton telephoned Collins at about 9:00 p.m. He told Collins to call him if Collins heard anything. According to Helton, Collins called him back about 11:00 that night and said he had received several calls from people, advising him of Ruiz's death. Collins said nothing about anyone named Roach, Bam, or J Dogg.[16]

Just after 9:00 p.m. on March 3, Atwater Police Officer Ridenour responded to an address in Atwater in response to a report of a shooting. He came in contact with a person who identified himself as Keith (not Kevin) Trice, and who had gunshot wounds to his back and lower abdomen.[17] Because there was no trauma center in Merced County, standard procedure was to airlift Trice to Modesto. When told this would happen, Trice immediately and adamantly responded that he did not want to go to Modesto. Medical personnel explained that there were no other options. Ridenour questioned Trice in the ambulance on the way to the airfield. Trice did not answer some of Ridenour's questions, although he did say that he did not know who shot him; that the

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16 Collins denied having a second conversation with Helton that night. He did not tell Helton anything about appellants being at his house and Trice being shot, because he was not sure what was going on that night.

17 The name received by the paramedic was Kevin Trout. The paramedic observed symptoms consistent with shock, and assessed the patient's physical condition as being borderline critical. Shock would be a possible explanation for a lack of information being obtained from a patient. However, the paramedic's assessment was that the patient had the ability to answer questions, but was reluctant to do so.

person or persons were in a vehicle, but he did not know whether it was a car or a truck; and that he had been going to the store. Trice was similarly vague when questioned by a doctor at the hospital, adding little more than that he was from Los Angeles and had been down for three days, visiting a Sonjia in Atwater or Merced. Atwater police were unable to find any witnesses to a shooting or any physical evidence that one had occurred in the area.

Modesto Police Detectives Grogan and Blake interviewed Trice about 1:40 p.m. on March 4. Trice related that he had been in Atwater, visiting a friend named Sonjia Girtman, and was walking from her house to a store to purchase some alcohol, when he was the victim of a drive-by shooting. He said the car was dark and that he believed he was shot by someone sitting in the front passenger seat. Trice said he was bleeding profusely, and it took him some time to gather the strength to walk back to the apartment.

During the interview, Trice asked if he could use one of the detectives' phones to call his mother. After the interview ended, Blake allowed him to use his cell phone. Once he got connected, Trice said, "Mom, I got shot yesterday in Modesto." This was said as one complete sentence, without any gaps, although Grogan could not hear what, if anything, Trice's mother said or asked.[18] Grogan subsequently obtained items of evidence from the Atwater Police Department and Sonjia Girtman's house, including an expired driver's license for Keith Lamont Trice (Trice's twin brother) and a pair of brown pants that had Trice's blood on them. He measured the distance and travel time between the crime scene in Modesto and Girtman's residence in Atwater, and determined it was possible for Trice to have left the scene in Modesto and gone to the address in Atwater

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18 According to Barbara Trice, Trice's mother, Trice never said he was shot the previous day in Modesto. She did not ask if he had been shot; she had already heard that he had been, and that it had occurred in Atwater. Because she had heard a number of things about his health and that he had been taken to an infirmary in the jail, she asked his location. He said he was in Modesto.

between the homicide and when he placed the call for assistance.

Brocchini was assigned to research Trice. After talking to Trice's girlfriend and family, Brocchini put together a list of associates who matched the description of the suspects. He had photographic lineups made of those people, as well as Trice, and gave them to Detective Blake. Upon learning from Blake that the names Brocchini gave him were not identified, Brocchini continued to investigate and came up with Nichols as a possible suspect. He put together a photographic lineup of Nichols and gave it to Blake and Detective Owen.

Brocchini telephoned Collins the morning after the shooting. He was aware that Collins knew Ruiz and was working for Helton and the FBI. He wanted to know if Collins knew Trice, since Collins lived in Atwater and Trice had been found there. When Brocchini asked whether Collins knew Trice, to whom Brocchini referred by that name, Collins said no. However, Collins contacted Helton later that morning and told him that he thought something was going on. As a result, Helton and Hammond interviewed him that afternoon. Collins provided descriptions of Bam, Roach, and J Dogg. He said they had told him they had $5,000 and wanted to buy a quarter kilo, and that they would give him $500 to set up the buy. He later identified pictures of appellants and Blueford from photographic lineups.

Brocchini spoke to T. the afternoon after the shooting. When he asked if it was possible Ruiz had gone to meet somebody at the AM/PM minimart for the purpose of selling drugs, she said yes and agreed that whomever Ruiz spoke to in his last cell phone call could have had something to do with the incident. The caller log for Ruiz's cell phone showed that at 7:47 p.m. on the night of his death, he received a call from a cell phone associated with Dupree Hull, a Blood gang member who had been to prison. The last call Ruiz received, which was made at 7:59 p.m. that night, was from a cell phone associated with Thomas "Bird" White, another Blood member in Modesto, who dealt cocaine and had also been to prison. Brocchini asked around about their possible

involvement; the only information he was able to obtain was that the last couple of phone calls to Ruiz were from phones associated with them.

On March 5, Brocchini contacted a parole agent working for a fugitive task force in Los Angeles and directed him to find and arrest Nichols. Nichols was arrested that day in Pasadena. A black beanie was seized in a search of his house. The next day, Brocchini contacted Officer Roldan of the Pasadena Police Department, who was known to him as an expert in the Black criminal street gangs of Pasadena, and asked for help in identifying J Dogg and B Dogg. Brocchini got these names from Collins, who said that Bam Bam, B Dogg, J Dogg, and Roach had come by. Roldan researched J Dogg, and obtained enough information through an anonymous telephone call to figure out who this person was. As a result, Dean's photograph was obtained. Roldan and Brocchini, who had gone to Pasadena on March 7, put together a photographic lineup and e-mailed it to Detective Blake in Modesto. Half an hour later, Blake informed Brocchini that T. and R. had identified Dean as a suspect. As a result, Dean was arrested at his home.

After Dean's arrest, Brocchini continued his search for the Lincoln Town Car. Following receipt of a tip, he went to a Budget Rent-A-Car place and learned that a car rented to Tricia Lee was at a rental yard at the airport in Burbank. He went to the airport and saw what looked like blood in the car's back seat. Brocchini had the car impounded and processed for evidence.[19] Trice's blood was in the back seat. Nichols's palm print was found on the driver's side hood.[20]

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[19] At trial, Berenice Sanchez identified a photograph of the Lincoln located by Brocchini as looking similar to the car she saw before the shooting.

[20] The car was the only piece of evidence from which Donna Mambretti, the Department of Justice latent print analyst involved in this case, was able to get a print of quality suitable for comparison and obtain a match. Among items submitted by the Modesto Police Department (MPD) was a Taurus nine-millimeter pistol and magazine. The pistol had no latent impressions on it at all, except for fragments that were etched

Tricia Lee rented the Lincoln on a Friday in February 2002, as her vehicle was scheduled to be serviced. Her plan was to rent the Lincoln for the weekend and return it on Monday. Trice was with her when she rented the car. Lee ended up not taking her car to get serviced, and at some point on Friday, Trice asked to use the Lincoln. He was going to come back during the weekend. When Lee got off work that Friday, she went to Trice's mother's house in Altadena. The car was still there. Trice had her permission to use it Saturday. The next day, Lee attended a birthday party for Trice's nephew. She expected to see Trice there at some point, but did not. She unsuccessfully tried to page him during the weekend to remind him that the car needed to be back on Monday. On Monday morning, she received a call from Blueford, saying he had the rental car and so she could take it back and return it. She asked where Trice was, but he said he did not know.

On March 14, Brocchini listened to some telephone calls at the Stanislaus County jail. In one, Dean told his mother and sister to contact a lady he identified as JP's sister, and for whom he gave a telephone number. He wanted his mother and sister to make sure the lady said that Dean was dropped off at her house on Friday and was not picked up until after the weekend. As a result of information contained in the call, Brocchini contacted Lisa Young.

Young testified that Dean telephoned her on the Friday of the weekend of the homicide. Dean said he was in Modesto and wanted to visit her. She explained that she was going to be going out of town and would not be back until Sunday. At the time, Young lived in Fresno. Dean had visited her before and had brought Trice with him. She did not see Dean on the weekend of the homicide. Later, after Young had spoken to Brocchini and declined to say whether Dean had been with her, Dean's sister telephoned

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into the surface, meaning they had been there for quite some time. Mambretti was never asked to examine a .40-caliber bullet.

Young and said there was a message from Dean that he wanted Young to say he was with her that weekend.

On November 24, 2002, Herbert Brownlee, who lived on Walker Avenue approximately half a mile north of Woodland, reported finding a Lorcin .380 semiautomatic handgun underneath the empty engine compartment of a Mustang that he was preparing to take to the junkyard. The Mustang had been in a field next to Brownlee's house for months. The gun, which was rusted, had an empty clip in it and a live round in the chamber. At trial, T. identified this gun as being similar to the one Dean had.

Ruiz was shot at least nine times and sustained five fatal wounds. Stippling indicated that at least two of the shots were fired from close range. Death resulted from shock and hemorrhage due to multiple gunshot wounds. Four .22-caliber bullets from rimfire cartridges were recovered from his body during the autopsy. Although there was insufficient individual detail to definitively identify them as having been fired from the same gun, test firing showed that they could have been fired from the High Standard revolver recovered in this case. The nine-millimeter cartridge case found in the closet was fired by the Taurus nine-millimeter pistol. That pistol would not shoot a .40-caliber bullet; as the bullet would be too big for the chamber, the gun would not load itself and would jam. A nine-millimeter and .40-caliber cartridge are readily distinguishable because of their different diameters and weights. The condition of the Lorcin .380-caliber semiautomatic pistol was consistent with it being outside in a field for six to eight months or more, and the chamber and barrel were very corroded. The pistol was rusted shut, and a CCI-brand live round had to be forcibly removed from the chamber. This unfired round was the same caliber, and from the same manufacturer, as an expended cartridge from the homicide scene that was submitted for comparison, but results were

inconclusive as to whether the expended cartridge had been fired from the Lorcin.

Gang Evidence[21]

One of the items seized in a parole search of Nichols's house at the time of his arrest was a red baseball cap with a P on it in three different places. A probation search of Dean's residence that was conducted when Dean was arrested revealed a letter in his bedroom that was addressed to J Dogg, and which was from a PDL Blood in prison. An April 1, 2002, search of the jail cell in which Dean and Nichols were housed turned up several items on which were symbols and writing referencing Denver Lane.

Pasadena Police Officer Okamoto testified as an expert on gangs, specifically PDL. He explained that PDL is a large gang that "pretty much controls all of Pasadena." He had also gotten calls concerning PDL involvement in criminal activity in a number of areas outside Pasadena. Okamoto described PDL as very violent and involved with numerous types of criminal activity. In his opinion, PDL is a criminal street gang as defined by the Penal Code. Its primary activities are theft, robbery, drug sales, carjacking, assaults, and murder. In March 2002, PDL had at least 50 members.

Okamoto explained that there are two sets of African-American gangs: the Crips and the Bloods. Although there are numerous different gangs within those two, all are either a Crip set or a Blood set. Crips and Bloods are rivals. Bloods' predominant favorite color is red; Crips' is blue. PDL is a Blood set. Their main rivals are the Altadena Block Crips and the Raymond Avenue Crips. PDL members often wear a Philadelphia Phillies hat, which is red with a white P on the front. The hat seized in the search of Nichols's residence would signify someone was wearing gang attire, and "obviously" would be the hat of someone who was representing Pasadena.

In addition to colors, gang members use hand signals to identify each other. PDL

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21 Additional gang evidence will be discussed when we address appellants' motion to bifurcate the gang allegations, *post*.

members will make a P, an L, and a D with their hands, or, if they happen to see a rival as they drive by, they may throw up a quick L to signify they are from PDL. Tattoos show fellow gang members that a person is really involved with gang activity. Common tattoos are PDL, WSB for West Side Blood, DLB for Denver Lane Blood, or DL. A Blood may also have a CK tattoo, which stands for Crip Killer. In their graffiti, they will sometimes cross out the letter A so as to disrespect Altadena Block Crips. If someone passes away, they will not use the R in rest in peace, because that would be representing Raymond Avenue Crips. Instead, they will put BIP for Blood in Peace. Blood members also often call each other "Blood," both orally or in writing, or will call each other by a moniker or "homey."

In Okamoto's experience, when gang members commit crimes with other people, they normally commit those crimes with fellow gang members they can trust. They will not take an associate or someone who will be a weak link if arrested. A lot of PDL's activity is based on some type of monetary gain, as well as respect and intimidation.

Based on his review of a variety of materials, Okamoto concluded that Nichols, Trice, Dean, and Blueford were PDL members. He further opined that they were active PDL criminal street gang members on March 3, 2002. In Okamoto's opinion, appellants and Blueford willfully promoted, furthered, or assisted felonious criminal conduct by members of the gang by the actions alleged to have occurred in this case. The bragging rights they would bring back to Pasadena would garner them a large amount of respect from their fellow gang members, and would also bring a lot of respect to the gang. It was Okamoto's further opinion that each of the four actively participated in a criminal street gang with knowledge that its members engaged in a pattern of gang activity. His opinion was based on the intimidation factor they would bring back into the neighborhood. Whatever they would recover, such as narcotics, they would bring back into Pasadena and sell for some type of monetary gain, and then they could purchase more weapons, which would help them in more criminal activity. Furthermore, the crimes alleged were

committed at the direction of or in association with a criminal street gang. All four individuals were active PDL gang members, and would not want to take an associate or someone they could not trust, so when recruiting in a case like this, they would definitely recruit fellow gang members.

Brocchini also testified as an expert in criminal street gangs, and expressed opinions, and bases therefor, that were consistent with those expressed by Okamoto. In addition, Brocchini explained that Crips call each other "Cuz," while Bloods call each other "Dogg."[22]

Nichols had several tattoos. One was "Lanes" with an X through the A, which was a sign of disrespect to the Altadena Block Crips. Another of Nichols's tattoos was "God Forgive, Lanes Don't." Trice had "Pasadena" tattooed across his back, with "D" on the back of his left arm and "L" on the back of his right arm. He also had "BIP" ("Blood in Peace") on an arm. Dean had no tattoos. However, Brocchini reviewed records for the cell phone attributed to Dean. He found calls made between February 25 and March 4, 2002, to the phone of Trice's girlfriend, Trice's pager, and Blueford's phone.

Brocchini was aware that Ruiz was a criminal street gang member. In his experience, gang members rob other gang members, because if someone breaks into a gang member's house, that person will find drugs, guns, or money. In addition, gang members usually do not report robberies, but instead try to get their belongings back on their own.

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[22] Brocchini had never researched or listened to the music of rapper Snoop Dogg, who is well known as a Crip.

II

DEFENSE EVIDENCE[23]

The Homicide and Investigation

Greg Albiani, a teacher, lived across the street from the Ruiz family at the time of the shooting. He observed goings-on at the residence that he believed were consistent with drug activities. There was repeated car traffic, in which one or two people would drive up to the house, open the trunk of the car, pull out a shopping bag or something of that nature that did not appear to have anything in it, go into the house, and then come back out within five to 10 minutes with the same bag, place the bag back in the trunk, and then leave. Several times on different days, he saw a black Lexus in the area. One day, it drove up at least two or three times. It would come up and turn around and leave. Typically, there were two occupants in the car. Albiani also saw evidence of gang attire, such as khaki pants, white shirts, shaved heads, tattoos, baggy pants, and the like. Albiani contacted the police department and was informed they knew what was going on.

Shortly after the homicide, Albiani gave Detective Buehler a list of vehicles and license plate numbers that he suspected were involved in the activities he had seen at the Ruiz house. Buehler did not check the license plate numbers Albiani provided, and could not recall if he asked anybody else to do so.

At approximately 8:15 or 8:20 p.m. on March 3, 2002, James Norris was in a park located several blocks south of both Woodland Avenue and Montilla Lane. Norris saw a male in a black hooded sweatshirt, running south along the park. He was running very fast and kept turning around and looking back, as if maybe someone was after him. This person met up with two other individuals at the south end of the park. They talked for 30

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23 We treat all defense evidence as having been presented on behalf of all appellants.

seconds to a minute, then ran father south. An officer was patrolling the area and asked if Norris had seen anyone. Norris reported what he had seen.

Modesto Police Officer Wilcoxson was one of the first responders to the Ruiz residence following the shooting. He spoke briefly to T., who was hysterical. He also interviewed R. She said she saw four or five Black males come through the garage door and force their way into the house. She described one as being approximately 20 to 30 years old, about five feet 10 inches, tall and thin, and wearing a black beanie on his head, as well as a long-sleeved black shirt and black baggy jeans. She was unable to give any other descriptions.

Modesto Police Officer Sanchez was involved in securing the homicide scene. In the exterior lock of the front door was a set of keys that appeared to have blood on them.

Detective Owen interviewed T. on March 4 and showed her two photographic lineups. One included Nichols's picture. T. said that the skin tones of the suspect were lighter than those in the pictures. After Owen asked whether any of the photographs looked similar aside from the skin tones, T. focused on the photograph of Nichols. She said the facial features were very similar, and she eliminated all the other photographs. She said she wanted to see the individual in person. She wanted to see the total body because there were parts of his body she felt she could identify. She said the suspect had a fat gut and fat sides and his stomach jiggled. After looking at the second photographic lineup, T. said none of the people looked familiar. Owen noted, however, that she looked at Trice's picture several times. When Owen asked why, she said the complexion, forehead, and hairline were the same, but she was not sure and wanted to see the man in person. T. said she could eliminate two of the photographs, but not the others. On March 12, Detective Blake showed two photographic lineups to T., one of which contained Blueford's picture. T. did not see anyone she recognized, although she pointed to one she said resembled one of the suspects. The photograph was of someone other than Blueford.

Dr. Mitchell Eisen, a psychologist who testified concerning eyewitness memory

and suggestibility, explained that research shows people are better in general at making identifications within their own race than they are cross-race. Cross-racial groups tend to have higher rates of false identifications than same-race groups. Research also shows that the younger the child, the more suggestible, because the more the child tends to rely on adults for cues as to what the adult is after and what really happened. Children are not as skillful as adults in organizing information so that it can be recalled on demand. Children are particularly influenced by their parents.

W. Jerry Chisum, a crime scene reconstructionist, examined photographs, crime scene videos, and other materials in connection with this case. Based on his review of the evidence, he concluded Ruiz was shot in the bedroom itself, not in the closet. He reached this conclusion because there was no blood documented in the closet. There was, however, blood spatter in the bedroom itself. If someone other than Ruiz – for example, Trice – was shot inside the house and sustained a through-and-through wound, there would have been a bullet and some blood, which would have contained DNA. Chisum conceded that he could not exclude blood being in the closet; it could have been too small a spot to observe, or there could have been blood evidence that was not documented. He also conceded it was possible for someone to get shot and not have blood recovered from the location at which he or she was shot. Someone could be shot and have internal, as opposed to external, bleeding; moreover, it was possible that clothing could catch external bleeding and prevent the blood from landing on the ground.

The jamming of the nine-millimeter pistol indicated to Chisum that someone had removed a nine-millimeter cartridge from the magazine and inserted a .40-caliber cartridge in its place. When the gun was fired once, the larger-caliber cartridge moved up, would not chamber properly, and jammed the weapon. In the photographs Chisum reviewed, the box of .40-caliber cartridges appeared to be closed. Chisum would have asked to have the weapon's magazine and the cartridges fingerprinted, particularly the .40-caliber cartridge causing the jam, the nine-millimeter shell that was in the box, and

the box itself. No physical evidence Chisum saw showed Ruiz had the nine-millimeter pistol in his hand or fired it. As for the shots fired through the closet door, the powder was still present. None of the physical evidence indicated when the shots were fired, however. They could have been fired an hour or even two days before the police arrived.

Chisum reviewed photographs of the bathroom window area. He did not believe they were consistent with someone going through that window, because of the way the window's screen was dislodged and the lack of damage to the bush, and absence of footprints in the soil, below the window. The lawn appeared to be about two feet from the window, however. It was possible that if someone landed on the grass and a photograph was taken several hours later, there might be no evidence of the landing.

Trice testified that in the latter part of February 2002, his girlfriend, Tricia Lee, was going to have her car in the shop for a couple of days. As a result, the two of them went to the rent-a-car place and she rented a Lincoln Town Car. He believed this took place on Thursday, February 28.

As Lee had to return to work, Trice drove the Lincoln to Altadena, where he was living with his parents. A couple of hours later, at around 2:00 p.m., he drove it to the house of Bobby Blueford's girlfriend. Trice had grown up with Blueford and Dean, and he and Blueford sat and talked for a while. Trice told Blueford that he felt like going to Madera to visit some lady friends. He also had family there, as well as in Merced. Trice had been wanting to visit for some time, and felt that since he had the car, he might as well go. He also wanted to see if he could buy some cocaine. He invited Blueford to go with him, so Blueford said to pick him up later. The plan was just to hang out and party with some people Trice knew, and to get away from the Los Angeles scene for a little while.

After leaving Blueford's house, Trice went to Dean's residence to see if he wanted to go to Madera. Dean said he would let Trice know, so then Trice went to Nichols's house. Trice had known Nichols for nine or 10 years. When Trice said he was going up

north, Nichols agreed to go, as he wanted to visit his young son in Madera.

Trice had more than one source of cocaine, although he usually dealt with his uncle, Bernard. Phil Collins was not a definite source at the time, although Trice knew he had sold drugs in the past. Trice associated with Collins when Trice was selling drugs in Merced. Trice telephoned a lady friend, Shawana, and told her he would be up in Madera. He also might have called Collins sometime during the day. He tried unsuccessfully to contact Bernard; he had around $5,000 and wanted to buy a quarter kilo of cocaine.

Around 8:00 that night, Trice picked up Nichols and Blueford. They went to a liquor store to get things they would need for the trip, then went to Dean's house. Dean had decided to go, but chose to ride his motorcycle. After he got his things, the group went to a gas station. Trice, Blueford, and Nichols were in the Lincoln, with Trice driving. At the gas station, Trice made some telephone calls, then they headed north. Nichols was now driving, and those in the car were drinking and smoking marijuana. While going over the Grapevine, Trice started coughing hard, and then his nose started to bleed. The group stopped at a gas station so he could clean himself up, as he had blood on him.

The group finally arrived in Madera. When Trice was unable to locate Bernard, they went to Shawana's house. Trice dropped Nichols at his son's mother's house on the way, then Trice, Blueford, and Dean spent the night at Shawana's residence.

The next morning, Friday, March 1, appellants and Blueford headed to Collins's house in Atwater. Trice and Blueford had been in prison with Collins. Collins was home, and everyone ended up in his back yard, socializing. After a while, Trice told Collins why he was there, and that he wanted to buy a quarter kilo. Collins said he had a connection and could hook it up, and that he would check on it and Trice should get back to him. Collins's attitude toward the whole thing was nonchalant. Nothing was said about what he would get out of it, but Trice's understanding was that the middleman

would either take something out of the money or would get something from the dealer. The price discussed with Collins for the quarter kilo was $4,500.

Appellants spent a couple of hours at Collins's house, then headed to Merced. Dean was in the car with them this time. Trice was trying to catch up to Bernard as another possible source of drugs, but could not locate him. The group then returned to Shawana's house in Madera. After an hour or so, Trice left by himself to look for Bernard. While looking, he ran into a friend of his who tried to hook him up to get some cocaine. Trice learned there would be a party that night, and he returned to Shawana's house to get the others. They partied for a while at a house in Madera, then Trice took Dean and a woman Dean met at the party back to Shawana's house so Dean could get his motorcycle. Dean said he was going to the woman's house, and Trice returned to the party, where Nichols and Blueford were. They stayed at the party until late, then Trice dropped Nichols off at the home of his son's mother, and Trice and Blueford returned to Shawana's house. Trice did not hear anything from Dean after Dean got his motorcycle.

The next morning, Trice told Blueford to take the car back to Lee, as he knew she would need it that day. Blueford agreed. Trice was not going back, but instead was still trying to get some cocaine. Trice went to pick up Nichols and told him what was planned, then took him back to Shawana's house. Trice then left to gas up the car and try again to find Bernard. He found him at the home of the mother of Bernard's child. The couple was arguing, so Trice and Bernard got in the Lincoln and rode around for a while. Trice asked about cocaine and Bernard said he would hook him up, but Trice could tell he was not really into it. Trice asked when he would be heading back to Merced, where he lived, and Bernard said it would be that afternoon. Trice told him to pick him up at Shawana's house, and Bernard agreed. Trice then returned to Shawana's residence and gave the car keys to Blueford, and then Blueford and Nichols left.

Trice remained at Shawana's home, waiting for Bernard. When Bernard did not

come, Trice telephoned the mother of Bernard's child and learned that Bernard had left. Trice then took the bus to Merced. He was still trying to catch up to Bernard, but, when he could not make telephone contact, he called Sonjia Girtman to come and pick up him, and the two went back to her house in Atwater. Girtman's residence was less than a mile from Collins's house.

Trice spent Saturday night with Girtman at her residence. The next day, they waited for one of her daughters, Tanisha, to arrive. They then socialized with Girtman's daughters and a friend. Later that evening, after the friend left, Trice told Girtman that he was going to the store. It was nighttime; he smoked a cigarette outside the residence, then gradually walked around the corner. He was not paying much attention, because the store was just down the street. He was walking with his head down and, although he noticed when a car pulled up, he thought nothing of it at the time. There were two people in the car; he thought they might be Hispanic. The passenger said something to him, but he did not catch what. He asked what was up, then saw the passenger pull out a gun. The man fired and Trice was hit.

Trice fell down and then crawled to a little grass area. He lost his strength and did not hear the car drive off. He did not know how long it took him to get up, but he gathered some strength and made it back to Girtman's residence. He was bleeding and in pain. He opened the door and fell in the doorway, then told Girtman to call the paramedics. Trice remembered Tanisha holding a towel to his back and him leaning over the couch. Trice felt very cold and was in a lot of pain and thought he was going to die. He had no idea what happened to his money.

Trice denied giving his name as Kevin Trout or Keith Trice. The Atwater police took Keith's driver's license out of Trice's pants, where Keith had previously left it. Trice was not using it to pass himself off as Keith. As twins, it was not unusual for the brothers to wear each other's clothes.

Gang Evidence

Timothy Rhambo, who was a youth counselor for a group home for foster children in Pasadena and also a boxing coach for children in the community, was involved with PDL in the late 1980's. In the 1990's and early 2000's, he got to know Nichols quite well. Nichols helped him a lot. They tried to organize a few things in the neighborhood to get people together to stop the violence, such as a football game between the youngsters and the OG's. This was in 2000 or 2001. Nichols was one of the main organizers. There was a lot of Blood-against-Blood violence going on, with young PDL members against older PDL members, and the point of the event was to show that they did not need to be violent toward each other. Nichols's involvement brought credibility to Rhambo and what he was trying to do, as Nichols was more known as a gang member.

It is easy to get out of PDL; a person simply stops being "with that" and associating with the people he was associating with before and starts doing his own thing, whatever it is. Rhambo was seeing this from Nichols during the summer of 2001, although Nichols had been in and out of jail a lot and had had a reputation as being a hardcore gang member. Rhambo was also acquainted with Trice, with whom he had gone to school. In the late 1990's, Trice no longer dressed like he had in the early 1980's, when he was a PDL member. Rhambo had also seen Dean before, and thought he was "probably" an active gang member "back in the day," although he did not know. He could not remember where or in what context he had seen Dean.

DISCUSSION[24]

[24] A number of the issues raised on appeal were raised by appellants in their new trial motions, and are now presented both by way of claims the trial court erred in

I

DISCLOSURE ISSUES

A. Collins's Gang Status

Appellants contend the judgments must be reversed because the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and its progeny by withholding evidence that Phillip Collins was a gang member, that he perjured himself on that point, and that Detective Brocchini and Sergeant Helton corroborated the perjury. We find no cause for reversal of the judgments.

1. Background

Collins's involvement in the case is summarized in the statement of facts, *ante*. During examination by the prosecutor, he testified that he "hung out" with Bloods while growing up on the west side of Modesto and bought drugs from them. He further testified that gang members use tattoos to signify what gang they are from, and that he had seen them use geographical tattoos such as the name of their town or "'West Side,'" "'North Side,'" or "'East Side.'" On cross-examination, Collins testified that he was never a gang member. He admitted having a "Westside Blood" tattoo, but, when asked whether that term had a gang connotation, he said he got it in CRC to fit in, and that there were no Westside Bloods in Modesto. When asked, "So you were just a Westside Blood in CRC?" Collins replied, "Yes."

Helton testified on cross-examination that, to his knowledge, Collins was never a member of a criminal street gang, and that Helton probably would have known had he

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denying those motions and also independently. As our resolution of each issue on the merits will necessarily also resolve the related claim the trial court abused its discretion by not granting a new trial, we will not separately address that contention. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27; *People v. Carter* (2005) 36 Cal.4th 1114, 1210; *People v. Panah* (2005) 35 Cal.4th 395, 490; *People v. Martinez* (1984) 36 Cal.3d 816, 821-822.)

been.[25] When Brocchini was asked, "Is Phil Collins a gang member?" he replied, "No." Asked how he knew, Brocchini testified: "Because I worked in the gang unit for a long time and I knew Phil Collins, too. He was a drug dealer."[26]

Appellants each filed a motion for new trial.[27] Nichols asserted in part that Brocchini had prepared a report, dated February 10, 1998, in which Collins was included as a member of the Oak Street Posse (OSP), a known criminal street gang, and that this information was material to Collins's credibility, known by Brocchini, and not disclosed to the defense. A copy of the report, which identified "Collins, Phillip" as the person listed as "Philthy Phill" in the "105" column of the OSP roster, was attached as an exhibit.

An evidentiary hearing was held. Brocchini testified that about a year after his trial testimony, he was reviewing the particular MPD case report number referenced on a subpoena he received from the defense when he found a report he had written as a gang deputy in 1998. The report concerned a handwritten list found by a deputy in the jail cell of Norval Williams. It was a then-current list of OSP gang members. In 1998, OSP, a Black criminal street gang operating in Stanislaus County, had both Crips and Bloods in it. The list was split into two halves, the 105 section and the 213 section, with those numbers being addresses on Oak Street. The 105 section was Blood gang members who claimed OSP, while the 213 section was Crip gang members who claimed OSP. After the list was found under a bunk in the jail, Brocchini deciphered the identity of some of

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[25] Helton was in the gang unit for the second time from 1996 through 2000.

[26] Brocchini was a gang detective from 1997 to 2000, and specialized in Black gangs, among others.

[27] Early on in trial, all were deemed to be joining in each other's motions. It is clear from the record that the trial court also regarded them as joining in each other's objections. Accordingly, throughout the appeal, we will treat an objection or motion made by one as having been made by all.

the people. He was able to do so from working in the gang unit for a long time and talking to them and hearing what they called each other. One of the names on the list was "Philthy Phill," whom Brocchini identified as the same Phillip Collins who testified at trial.[28] In writing the report, Brocchini never said Collins was a Blood; Collins was listed by an OSP member as being in that gang as a Blood. When Brocchini heard Collins deny at trial that he was a gang member, Brocchini believed him because Brocchini had not come across any field identification cards with Collins's name on them.

Brocchini further testified that at trial, because he was asked to render an opinion concerning whether appellants were criminal street gang members, he did a gang workup on them. He did not do anything similar with regard to Collins during the pendency of this matter. Moreover, he would not identify anyone as a gang member simply because the person's name was on the roster, because that alone would not meet a sufficient number of MPD's criteria. Collins had a gang tattoo, and Brocchini knew he associated with gang members and that he had been named by other people as a gang member at the time Collins testified. That fit three of the criteria used by MPD to establish who was a gang member. Even assuming Collins was a gang member in 1998, however, this would not necessarily mean he was still a gang member when he testified, as it is possible to get out of the gang. Brocchini did not know about Collins's tattoo until Collins testified about it, and he opined that Collins was not a gang member at the time Collins testified that he was not a gang member.

Brocchini did not tell anyone about the OSP roster or give a copy to the defense prior to trial because he did not remember it. The list was in a file regarding Norval Williams. Given the way MPD's database was set up, the only name entered in it would have been the one indexed on the front, i.e., Williams. The MPD gang unit did not keep

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[28] Brocchini did not recall how he linked the moniker "Philthy Phill" with Collins.

an individual file for each suspected gang member; there was no file for Collins.

In its written ruling on the new trial motions, the trial court stated: "The Court finds Detective Brocchini's testimony to be disingenuous. In 1998, Collins was associating with gang members, had a gang monicker [*sic*], a gang tattoo, and was listed on a gang roster. MPD's own criteria provide that a person isn't considered a 'drop-out' until there has been at least 5 years of no activity. In stating his opinion at trial, Brocchini did not state the many gang indicators that he was disregarding in reaching his fairly incredible opinion. Moreover, his opinion appears to have been made for the purpose of bolstering Collins[']s credibility in the eyes of the jury. The Court believes that Detective Brocchini withheld material information in testifying to this opinion." In examining this and other defense claims concerning the gang evidence, the court found "plentiful evidence of gang membership, but scant evidence of gang benefit," and that "[t]he only evidence which the jury could have relied on in reaching their decision was the opinions of the 2 experts [Brocchini and Okamoto]." The court concluded: "[T]aken individually, each of [the enumerated] problems with the gang testimony were [*sic*] not sufficient to raise a concern for the integrity of the process. However, when viewed in the aggregate, the Court does have a serious concern whether the proceedings leading to the jury's true finding[s] on the PC § 186.22(b)(1) gang enhancement were fundamentally fair. Accordingly, the Court orders the jury's finding on this enhancement stricken on each of the counts …. [¶] In all other respects, the motion is denied and the verdicts affirmed."

2. Analysis

"[T]he suppression by the prosecution of evidence favorable to an accused … violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady*, *supra*, 373 U.S. at

p. 87.)[29] The duty to disclose such evidence is wholly independent of the prosecutor's obligation under section 1054 et seq.[30] (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244), exists even where there has been no request by the accused (*United States v. Agurs* (1976) 427 U.S. 97, 107), encompasses both impeachment and exculpatory evidence (*United States v. Bagley* (1985) 473 U.S. 667, 676), and extends to evidence known only to law enforcement investigators and not to the prosecutor (*Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-870; *Kyles v. Whitley* (1995) 514 U.S. 419, 438; *In re Brown* (1998) 17 Cal.4th 873, 879). "In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.' [Citations.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042, quoting *Kyles v. Whitley, supra*, 514 U.S. at p. 437; *In re Brown, supra,* 17 Cal.4th at p. 879.) Disclosure must be made at a time when it would be of value to the accused. (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 51.)

Although "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so-called '*Brady* material' – … there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed

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29 Although the good or bad faith of the prosecutor is not determinative (*Brady, supra*, 373 U.S. at p. 87; *In re Ferguson* (1971) 5 Cal.3d 525, 532), and suppression of materially favorable evidence violates due process regardless of whether it was intentional, negligent, or inadvertent (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1225), we nevertheless note that appellants do not accuse the prosecutor himself o *knowingly* permitting perjured testimony (see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1252-1253).

30 Section 1054.1 provides in part: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] … [¶] (e) Any exculpatory evidence."

evidence would have produced a different verdict." (*Strickler v. Greene* (1999) 527 U.S. 263, 281, fn. omitted.) Thus, to merit relief on due process grounds, "the evidence a prosecutor failed to disclose must have been both favorable to the defendant and material on either guilt or punishment. Evidence would have been *favorable* if it would have helped the defendant or hurt the prosecution, as by impeaching one of its witnesses. Evidence would have been *material* only if there is a reasonable probability that, had it been disclosed to the defense, the result would have been different. The requisite *reasonable probability* is a probability sufficient to undermine confidence in the outcome on the part of the reviewing court. It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.]" (*People v. Dickey* (2005) 35 Cal.4th 884, 907-908; *Kyles v. Whitley*, *supra*, 514 U.S. at pp. 434-435, 436; *In re Brown*, *supra*, 17 Cal.4th at pp. 886-887.) "A showing by the [defendant] of the favorableness and materiality of any evidence not disclosed by the prosecution necessarily establishes at one stroke what in other contexts are separately considered under the rubrics of 'error' and 'prejudice.' For, here, there is no 'error' unless there is also 'prejudice.' [Citations.] It follows that harmless-error analysis under *Chapman* v. *California* (1967) 386 U.S. 18, 24 [(*Chapman*)], with its standard of 'harmless beyond a reasonable doubt,' is not implicated." (*In re Sassounian* (1995) 9 Cal.4th 535, 547, fn. 7; *Kyles v. Whitley*, *supra*, 514 U.S. at pp. 435-436; *In re Brown*, *supra*, 17 Cal.4th at p. 887.) "In sum, once there has been … error …, it cannot subsequently be found harmless …." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 436, fn. omitted.) Conclusions of law and mixed questions of law and fact, such as the elements of a *Brady* claim, are subject to independent review. (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1042.)

We turn first to whether the undisclosed evidence would have been favorable to appellants. This was not the typical situation in which gang involvement provided a readily apparent bias or interest or motive to testify, as when a member of one gang

testifies in favor of a member of the same or an allied gang, or when a witness is reluctant to testify for fear of retaliation. (See, e.g., *People v. Ayala* (2000) 23 Cal.4th 225, 276-277; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450.) Nevertheless, we assume Collins's gang status was relevant to his credibility. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168.) This being the case, Brocchini's 1998 report should have been disclosed to the defense, if not before trial, then certainly once Collins testified that he was not a gang member. Instead of disclosing information he possessed to the contrary, however, Brocchini confirmed that Collins indeed was not a gang member. Even if this was his honest opinion, the defense had the right – and should have had the opportunity – to challenge both him and Collins, especially in light of the fact Collins met several of MPD's gang criteria.[31]

We turn now to the question of materiality. In making our assessment, we have undertaken the cumulative evaluation required (*Kyles v. Whitley*, *supra,* 514 U.S. at p. 441), and taken into consideration the effect of the nondisclosure on defense investigations and trial strategies (*United States v. Bagley*, *supra,* 473 U.S. at pp. 682-683; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132-1133, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22). We conclude the suppressed evidence was not material under all the circumstances, as there is no

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31 We need not address, at any length, Helton's testimony on the subject. Instead of testifying definitively on Collins's gang status, Helton testified only that Collins was not a gang member *to his knowledge*, and that he *probably* would have known if Collins was. Although Helton was in the gang unit at the time Brocchini wrote the report, nothing in the record before us suggests Helton knew of its existence, and Helton was not called to testify at the hearing on the new trial motions. On this record, it would be speculative for us to conclude that Helton withheld information or condoned or corroborated erroneous testimony. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 952.)

reasonable probability its disclosure would have altered the trial result. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1132.)[32]

With respect to Collins, "'[i]n general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime," [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case, [citation]. In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony," [citations].' [Citation.]" (*People v. Salazar, supra,* 35 Cal.4th at p. 1050.) Here, the most important portions of Collins's testimony – especially his identification of appellants as the perpetrators – was corroborated by the testimony of T. and, to a certain extent, R., as well as by circumstantial evidence. Brocchini's undisclosed report did not absolutely establish Collins was a gang member; moreover, jurors were aware that Collins associated with gang members and that he had a tattoo that Officer Okamoto, one of the prosecution's gang experts, testified was a common gang tattoo. Jurors knew from Brocchini's own testimony that the existence of gang tattoos and association with gang members were two matters that gang experts found indicative of gang membership.

Most importantly, even assuming jurors would have concluded Collins lied about his gang status, such a conclusion would not have significantly altered the picture jurors already had of Collins or the myriad reasons to question his credibility on less collateral matters. The evidence showed that Collins entered into a deal with law enforcement

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32 Such a probability must be, "'as it were, "objective," based on an "assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision," and not dependent on the "idiosyncrasies of the particular decisionmaker," including the "possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." [Citation.]' [Citations.]" (*In re Sodersten*, *supra*, 146 Cal.App.4th at pp. 1226-1227.)

authorities whereby he would set up his best friend, a man he had known since childhood. Under this deal, Collins was supposed to plead guilty to selling drugs and serve a sentence in the local jail, but, despite the fact he supposedly was not receiving any consideration for his testimony in the homicide case, he ended up not even being prosecuted in his case. When the operation against Ruiz went federal, Collins was no longer working off a case, but instead was working for monetary compensation. Significantly, despite the fact the agreement specifically targeted Ruiz and his drug operation, Collins never alerted Helton or Hammond to appellants' presence or desire to purchase a quarter kilo of cocaine from Ruiz, nor did he ever truly explain why he did not alert either of them. According to Helton, this was a significant enough amount of drugs that he would "[c]ertainly" have wanted to know about it. When Helton first contacted Collins to notify him of Ruiz's death, Collins said nothing about his knowledge or suspicions. Similarly, he said nothing to Brocchini when Brocchini contacted him the day after the shooting.

In light of the foregoing, the undisclosed evidence, while favorable to appellants insofar as it tended to impeach Collins's credibility, was not material "because it would have added little to the cumulative impact of the other impeachment evidence." (*People v. Dickey*, *supra*, 35 Cal.4th at p. 908.) Given the substantial impeachment to which Collins's testimony was subjected at trial, we conclude it is not reasonably probable "that whatever confidence the jury placed in [his] testimony would have been fatally undermined" (*ibid*.) by learning that a moniker identified as referring to him was listed on a years-old roster for a Modesto criminal street gang, or even that Collins lied in denying he was a gang member. While we do not take potential perjury lightly, this is simply not a case in which the withheld information painted a significantly different picture of Collins and his credibility from the one placed before the jury. (Contrast *In re Sodersten, supra,* 146 Cal.App.4th at pp. 1233-1235; *People v. Johnson* (2006) 142 Cal.App.4th 776, 783-786.)

Appellants point to the effect the withheld evidence would have had on Brocchini's credibility. The bulk of Brocchini's testimony concerned the gang enhancement allegations, however, and those were stricken by the trial court. Moreover, defense counsel attacked Brocchini's credibility, ably and at length, and expressly suggested none of his testimony could be trusted. Given the fact the undisclosed report was written approximately eight years before Brocchini testified at trial, it is not at all certain jurors would have concluded Brocchini was lying, as opposed to having a memory lapse, when he testified that Collins was not a gang member.

There is no reasonable probability that, had the 1998 report been disclosed to the defense, appellants would have been acquitted. Accordingly, because the undisclosed evidence was not material, reversal is not warranted.

B. Confidential Informants

Appellants ask this court to conduct an independent review of the sealed reporter's transcript of in camera proceedings, following which the trial court denied defense motions for disclosure of the identities of confidential informants. We conclude the trial court's ruling was correct.

1. Background

Prior to trial, appellants moved for disclosure of the identities of certain confidential informants. Following an in camera hearing, the trial court denied the motions. As to Detective Banks's informant, the court found the person to be a citizen informant who had requested anonymity, and that the person did not possess any exculpatory information. As to Officer Bolinger and Detective Buehler's informant, the court found the person to be a citizen informant who had requested anonymity. The court further found that the information the informant related to Buehler was not within the informant's personal knowledge and the informant did not know if the source of the information had personal knowledge, and that the informant did not have any other first-hand knowledge relating to the Ruiz homicide. As to the X/Y informants, the court noted

that X was Phil Collins (as had previously been disclosed), and that Y was a police informant receiving consideration, who had no direct connection with the current case and had no exculpatory information concerning it. As to each informant whose identity with not disclosed, the court found that the need for confidentiality outweighed the need for disclosure.

Nichols subsequently moved for reconsideration of the order as to Bolinger and Buehler's informant in light of additional discovery he had received concerning the fact T. lied during her testimony at the preliminary hearing. Terming T.'s credibility crucial to the prosecution's case, Nichols related that in a March 13, 2002, statement, Bolinger and Buehler's informant claimed to have information that $20,000 or more was taken from the residence following the homicide, and that the location of the money was known only to Ruiz, his brother, and T.; that Ruiz had fathered a child by another woman and T. was aware of that information; that T. had numerous boyfriends and was making trips to the Los Angeles area; that T. showed little emotion at the funeral; and that T. was living an expensive lifestyle but was having no problem paying her bills. The informant also identified George Dancer as someone who may have been involved in setting up the robbery. In a March 15, 2002, statement, the informant related that Ruiz had a second safe located in the garage; that T. was continuing Ruiz's illegal drug business and had the lowest-priced methamphetamine in the county; and that T. had been seen selling drugs in Mellis Park. Nichols claimed the informant was a witness who was necessary in order for him to receive a fair trial, in that he or she had information relevant to the impeachment of T., and also could provide additional information that, with investigation, might lead to more relevant impeachment evidence.

The motion was denied as to all three appellants. Nichols subsequently challenged

the ruling by way of a petition for writ of mandate filed with this court. It too was denied.[33]

During the presentation of the defense cases at trial, appellants renewed their motions for disclosure of the identity of Bolinger and Buehler's informant. Appellants argued that evidence presented concerning the box of shells and the way in which the nine-millimeter jammed strongly indicated Ruiz was set up, and that T. had testified that, other than the children, she was the only one who had access to the bedroom in which the box was found; hence, in light of what the informant told the authorities, he or she was now much more significant in terms of establishing a possible motive on T.'s part for being involved in the setup. Appellants asserted the individual's information was consistent with their defenses and exculpatory, and that he or she was material to their cases. Finding nothing to change its reasoning or ruling, the trial court confirmed its order of nondisclosure. The court again confirmed its ruling in response to the motions for new trial.

2. Analysis

Appellants request that this court conduct an independent review of the reporter's transcript of the in camera hearing, pursuant to *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*), to determine whether the trial court's ruling was correct.[34] Respondent

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[33] Pursuant to Evidence Code sections 452, subdivision (d) and 459, subdivision (a), we take judicial notice of our docket entries in case No. F050361, *Nichols v. Superior Court*.

[34] Nichols contends the reporter's transcript suggests the documents reviewed by the court in camera were not maintained in the superior court file; hence, reversible error has been committed. We reject this notion out of hand, as it appears Nichols has misread the record. The reporter's transcript clearly shows that the documents discussed in the transcript pages he cites in support of his claim had to do with Dupree Hull's gang affiliation, and not the informant's identity. With respect to the confidential informant, the trial court did not review any documents in camera that had not already been disclosed to the defense. Cases dealing with a defendant's right to an adequate appellate

confusingly says appellants have not shown they are entitled to *Hobbs* review, apparently because (1) *Hobbs* addresses a situation in which the trial court sealed materials that revealed the identity of a confidential informant who provided information used to establish probable cause to issue a search warrant, which is not the situation here, and (2) the trial court here followed the procedure in *Hobbs* by conducting an in camera hearing, the information provided by the informant was not reliable or admissible, and the trial court's denial of the request to disclose the informant's identity was proper. For us to decide whether the trial court's ruling was correct, we must, of course, review the sealed transcript, which is what appellants ask us to do. Whether that review is based on *Hobbs* or some other authority – for instance, *People v. Martinez* (2009) 47 Cal.4th 399, 453, 454; *People v. Avila* (2006) 38 Cal.4th 491, 605-606; *People v. Lawley* (2002) 27 Cal.4th 102, 159-160; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123, judg. vacated on other grounds *sub nom. Bacigalupo v. California* (1992) 506 U.S. 802 – is immaterial.

"[T]he prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant. [Citation.]" (*People v. Lawley*, *supra*, 27 Cal.4th at p. 159; see Evid. Code, § 1042, subd. (d).) "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citation.] The defendant bears the burden of adducing ""'some evidence'"" on this score. [Citations.]" (*People v. Lawley*, *supra*, at pp. 159-160.)[35] "'Parties who challenge on appeal trial court orders withholding information as

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record (e.g., *Kaylor v. Superior Court* (1980) 108 Cal.App.3d 451, 457-458) are inapposite, as is *People v. Galland* (2008) 45 Cal.4th 354, 359-360.

[35] Recently, the California Supreme Court appeared to adopt the definition of "materiality" used with respect to claims of *Brady* violations, i.e., that ""'[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'"

privileged or otherwise nondiscoverable "must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record." [Citation.]' [Citation.]" (*People v. Avila, supra,* 38 Cal.4th at p. 606.)

We have done so here. At the in camera hearing, the trial court heard sworn testimony from both Bolinger and Buehler. Although the informant did not testify, there was no requirement that he or she do so. (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 29-30.) We have reviewed the testimony and conclude that the undisclosed information was not material to the defense. (See *People v. Martinez, supra,* 47 Cal.4th at p. 454; *People v. Lawley, supra,* 27 Cal.4th at p. 160.)

II

PRETRIAL ISSUES

A. Bifurcation of Gang Allegations

Appellants contend the trial court abused its discretion by refusing to bifurcate the gang allegations. We conclude reversal is not warranted.

1. Background

Brocchini was the prosecution's gang expert at the preliminary hearing, although he conceded that he had no expertise specifically in Southern California gangs. Ruiz was known to Brocchini to be a member of the West Side Boyz, a criminal street gang whose primary activity was selling drugs. In Brocchini's opinion, Ruiz was a shot-caller for the gang.

Brocchini related that, upon receiving anonymous information giving the names Bam and Nichols and that the person was from Pasadena, he contacted Roger Roldan, a gang expert for the Pasadena Police Department. Roldan identified Nichols as Bam. Brocchini also gave Roldan the name J Dogg, which he got from Phil Collins, and asked

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[Citations.]" (*People v. Martinez, supra,* 47 Cal.4th at pp. 453-454.) We need not decide to what extent, if any, the two standards differ, as the result is the same under either.

Roldan to help put together a photographic lineup. Brocchini contacted Agent Mandenlian, a parole agent on the fugitive task force, and informed him of the situation. Mandenlian said he would arrest Nichols for Brocchini. Brocchini then went to Pasadena and, Roldan having figured out J Dogg's identity, a photographic lineup containing Dean's picture was put together. This was transmitted to Detective Blake, who obtained a positive identification of Dean as one of the perpetrators.

After getting anonymous information that the perpetrators were Pasadena Denver Lane Blood members, Brocchini spoke to Roldan and Mandenlian about that gang, and also researched it through the Cal Gang Network, a system that allows agencies throughout California to input information about gangs. He spoke to Nichols's parole officer and learned that Nichols had identified himself as a PDL member. He also spoke to Carla Galbreath when he was looking for Dean; she said she associated with PDL members, and identified Dean and Trice as PDL members. Brocchini also spoke with Trisha Lee, Trice's girlfriend. She stated that Trice had been a PDL member for as long as she had known him, and that she gave him money each month so that he did not have to commit crimes with other gang members.

Based on information he obtained, Brocchini opined that PDL was a criminal street gang as of the date of the Ruiz homicide, and that appellants were PDL members. He further opined that the primary activities of PDL were selling narcotics, assault with firearms, robbery, and murder. With respect to the present case, Brocchini opined that the crimes were committed for the benefit of PDL. He based his opinion on experience talking with gang members; the only way they can gain weapons is by stealing them, and any other stolen property, such as cocaine, they could sell in their own territory to make money, which would benefit the gang. The fact the perpetrators came into town unmasked and armed, then committed a violent act in another town, would benefit PDL's reputation. Brocchini conceded that, in order to create the perception in people's minds that a gang is expanding its sphere of influence and is to be feared, the gang members

would have to identify themselves as belonging to that particular gang so people will know who committed the crime. He was unaware of anything in the facts of the present case in which any of the participants identified themselves as gang members to the victims.

At the conclusion of the preliminary hearing, the magistrate found "strong evidence" to sustain the gang enhancement allegations. Appellants were held to answer accordingly.

Prior to trial, appellants moved to have the gang enhancement allegations bifurcated, on the ground the gang evidence would have a prejudicial effect and would deprive them of due process and a fair trial. The People opposed the motion, arguing bifurcation was unwarranted because the gang enhancements were inextricably intertwined with the charged offenses and evidence of appellants' gang activities and membership was important to demonstrate their motive for the robbery. The trial court denied the motion.

In ruling on appellants' motions for new trial, the trial court found various problems with respect to the gang testimony. In light of these problems, which included the fact that "there was plentiful evidence of gang membership, but scant evidence of gang benefit," the court ordered the jury's true findings on the section 186.22, subdivision (b) enhancements stricken as to each count.

2. Analysis

In *People v. Hernandez* (2004) 33 Cal.4th 1040, the California Supreme Court held that a trial court has discretion to bifurcate trial on a gang enhancement. (*Id*. at p. 1049.) The court cautioned that bifurcation will sometimes be appropriate: "The predicate offenses offered to establish a 'pattern of criminal gang activity' (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily

prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Hernandez*, at p. 1049.)

In cases where a gang enhancement has *not* been alleged, the state high court has "held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation – including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like – can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.] [¶] Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself – for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged – a court may still deny bifurcation." (*People v. Hernandez, supra,* 33 Cal.4th at pp. 1049-1050.) In sum, "the trial court's discretion to deny bifurcation of a charged gang enhancement is … broader than its discretion to admit gang evidence when the gang enhancement is not charged. [Citation.]" (*Id*. at p. 1050.)

Gang evidence has an inherent potential for prejudice; it "creates a risk that the jury will infer that the defendant has a criminal disposition and is therefore guilty of the charged offense …." (*People v. Samaniego, supra,* 172 Cal.App.4th at p. 1167.) Yet, an allegation under section 186.22, subdivision (b) is a separate enhancement allegation, not a substantive crime. The extent to which a crime is committed to benefit a gang does not bear, in and of itself, on the issue of guilt or innocence of the underlying offense. Similarly, whether a defendant belongs to a gang does not prove guilt. "Nonetheless, evidence related to gang membership is not insulated from the general rule that all

relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. [Citations.]" (*People v. Samaniego, supra,* 172 Cal.App.4th at p. 1167.)

In our view, because of the potential for prejudice inherent in gang evidence, absent some showing the gang evidence is probative as it pertains to the issue of guilt of the underlying crime, failure to bifurcate is necessarily error. If the gang evidence (whether it be the defendant's association with a gang or some other aspect) is not at least minimally probative with respect to a charged offense, bifurcation should be granted. There must be something more than guilt by association or propensity.

The basic issues thus are relevance and prejudice, and they are inextricably intertwined. Questions the trial court should consider in determining the need for bifurcation include: Does anything about the crime reasonably suggest gang involvement or motive, even without a gang expert's interpretation? If the gang enhancement allegations were to be bifurcated, would at least some gang-related evidence likely be admitted in the trial of the substantive offense(s) anyway? If bifurcation is not ordered, what kind of evidence is likely to be admitted in support of the gang enhancements that is not probative of the charged crimes themselves, and how potentially inflammatory will that evidence likely be? For example, will evidence of the predicate acts or pattern of criminal gang activity involve crimes of violence much greater than any involved in the charged offenses, such that the jury will be likely to use it as bad character evidence against the defendant(s)?

Turning to the case before us, "[w]e review the correctness of the trial court's ruling at the time it was made, … and not by reference to evidence produced at a later date. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 739; see *People v. Turner* (1984) 37 Cal.3d 302, 312 [addressing ruling on severance motion], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149.) Here, it was apparent from the evidence adduced at the preliminary hearing that, although there were no overt signs

of gang involvement such as the flashing of signs or saying of a gang's name during commission of the charged offenses, some gang-related evidence would be admissible even in the event of bifurcation – for example, to explain how appellants were developed as suspects. There would also be evidence of more than one perpetrator acting in concert. The trial court reasonably could also have concluded the evidence related only to the gang enhancement allegations would not likely be more inflammatory than the facts of the charged offenses themselves. Under the circumstances, we cannot say the trial court's refusal to bifurcate "exceed[ed] the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) Accordingly, the trial court acted within its discretion in denying the motions for bifurcation. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1051.)[36]

This does not end our inquiry, however, since, by analogy to the law concerning severance (see *People v. Hernandez, supra*, 33 Cal.4th at p. 1050), even if the ruling denying bifurcation was correct when made, "[a]fter trial, … the reviewing court may

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36 Two points warrant addressing. First, Dean cites *People v. Partida* (2005) 37 Cal.4th 428, 437 for the proposition that "[i]t is a violation of constitutional due process to erroneously introduce evidence of gang affiliation." *Partida* says no such thing. At issue in that case was "when, if ever, a trial objection on Evidence Code section 352 grounds preserves the appellate argument that admitting the evidence violated a defendant's federal due process rights and, if the argument is preserved, under what circumstances error of this nature does violate due process." (*Partida*, at p. 431.) At the page cited by Dean, the opinion discusses when an objection under Evidence Code section 352 is sufficient to preserve a due process argument for appeal. (*Partida*, at p. 437.) In fact, the California Supreme Court ultimately upheld the Court of Appeal's finding of *no* due process violation resulting from the erroneous admission of some of the challenged gang evidence. (*Id*. at p. 439.)

Second, Nichols appears to suggest that if the trial court abused its discretion, then its ruling necessarily violated the federal Constitution's guarantee of substantive due process. Even if we were to find an abuse of discretion, it would not necessarily follow that the error was of federal constitutional magnitude, and the authorities cited by Nichols do not hold otherwise.

nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law. [Citation.]" (*People v. Turner*, *supra*, 37 Cal.3d at p. 313.) Appellants argue that admission of the gang evidence resulted in such a level of unfairness here, thus violating due process.[37]

The record before us leaves no doubt that evidence came before the jury that was unnecessary and had a high potential for being inflammatory and prejudicing appellants. For instance, evidence of numerous criminal acts, committed or allegedly committed by appellants and other PDL members, was admitted to establish that PDL was a criminal street gang within the meaning of section 186.22, and that appellants were associated with the gang.[38] While we recognize that the prosecutor had to prove beyond a reasonable doubt that PDL was a criminal street gang since appellants apparently would not stipulate to that fact, PDL's status as such was never seriously contested. Thus, there was no need for the prosecutor to introduce evidence of numerous predicate acts simply because subdivision (e) of section 186.22 refers to two *or more* offenses. Prosecutors have no right to overprove their case or put on every bit of evidence they have (*People v. Williams* (2009) 170 Cal.App.4th 587, 610), and the prosecutor's tactics here verged on overkill. While we cannot fault the introduction of evidence supporting the testimony of Officer Okamoto concerning what constitute PDL's primary activities, there is a fine line between evidence that constitutes legitimate proof of statutory elements or that demonstrates the basis for an expert's testimony, and evidence that constitutes illegitimate proof of guilt by association and bad character. It bears emphasizing that

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37 Appellants raised a due process objection to the evidence during trial.

38 The trial court instructed the jury on 10 specific instances of criminal conduct (including the charged robbery and murder) with respect to what constitutes a pattern of criminal gang activity.

trial courts must be careful to use their powers under Evidence Code section 352 to limit the evidence to its proper purpose – establishing the existence of a criminal street gang – and not to permit a prosecutor, through the guise of establishing that fact, to seek to imply improperly to the jury that the gang is violent, therefore the defendant is violent, therefore the defendant likely committed the charged crime(s).[39]

Despite the foregoing, we conclude that the erroneously admitted evidence was not, in light of all the circumstances and the record as a whole, so inflammatory and so lacking in probative value as to violate appellants' right to due process, even given the trial court's comments about the sufficiency of the evidence in its ruling on the motions

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[39] That the prosecutor here paid scant, if any, attention to the line between legitimate and illegitimate proof is demonstrated by his repeated attempts to present evidence of Nichols's and Trice's alleged involvement in the robbery and murder of a drug dealer in Madera. When the trial court denied his request to present the evidence on the issue of guilt pursuant to Evidence Code section 1101, subdivision (b), the prosecutor attempted to bring it in as a predicate act – despite the fact numerous predicate acts had already been introduced – and to show appellants were active gang members, associated with each other, and committed a crime for the benefit of a gang. In light of the obviously high potential for prejudice, the trial court again excluded evidence of the facts of the offenses, this time pursuant to Evidence Code section 352, and only allowed evidence of the resulting attempted robbery and assault convictions. This did not stop the prosecutor from trying to place before the jury evidence that Nichols was suspected of involvement in another homicide, again ostensibly to show that Nichols was associating with other criminal gang members committing crimes. After commenting, "This isn't just to show – to try and make him out to be a bad character, I take it," the court sustained the defense objections.

Although we will discuss the prosecutor's conduct elsewhere in this opinion, perhaps the single most egregious example of his behavior occurred in connection with the gang evidence. Counsel for Nichols was cross-examining Okamoto concerning his reliance on an offense of which Nichols was acquitted. When Okamoto stated that the type of activity was very consistent with gang activity, counsel responded, "I see. Even if he didn't do it and was found not guilty because he wasn't the one." The prosecutor then stated: "Objection, that misstates the evidence. *Just because he's found not guilty doesn't mean he didn't do it*." (Italics added.) Regardless of the accuracy of the statement, to have made such a statement in front of the jury is unconscionable.

for new trial.[40] The trial court was clearly aware of, and exercised, its authority to exclude cumulative and inflammatory evidence. (See *People v. Williams, supra*, 170 Cal.App.4th at pp. 610-611.) The court also required the prosecutor to have Brocchini testify regarding different areas than Okamoto and not simply go over the same ground. Brocchini acknowledged that gang members can commit crimes that are not for the benefit of the gang, and he gave an example from personal experience of a gang member who had been selling drugs for his own benefit, an offense that (unlike the domestic violence example Brocchini also gave) would often be perceived as benefitting the gang. He also testified that it is not a crime simply to be a gang member.

Significantly, Ruiz was himself shown to be a senior member of a gang and a large-scale drug dealer who cooked his product in, and apparently conducted at least some of his business from, the house in which his children lived. This served to neutralize at least some of the inflammatory effect of the gang evidence. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 173, affd. *sub nom. Victor v. Nebraska* (1994) 511 U.S. 1.) Also neutralizing were the circumstances of the charged offenses themselves – a callous, violent, home-invasion robbery and murder in the presence of young children who were lucky not to have been injured or killed themselves. Although some of the predicate acts were violent, so were the charged offenses. Additionally, in light of the total absence of physical evidence of a shooting in Atwater, admission of the gang evidence had little or no effect on Trice's account of events. (Contrast *People v. Avitia* (2005) 127 Cal.App.4th 185, 194-195.) Appellants' arguments to the contrary notwithstanding, evidence of their guilt was very strong, and the gang-violence evidence was not pervasive. (Contrast *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498.) Moreover, the trial court instructed the jury that it could consider the evidence of gang

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40 It necessarily follows that there was no prejudice under the state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.

activity only for the limited purpose of deciding whether a defendant acted with the intent, purpose, and knowledge required to prove the gang-related crime and enhancement and special circumstance allegations that were charged, and it cautioned jurors that they could not conclude from the evidence that a defendant was a person of bad character or had a disposition to commit crimes. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 820.) "Jurors are routinely instructed to make … fine distinctions concerning the purposes for which evidence may be considered …. [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Even where gang evidence is concerned, "[i]t is, of course, presumed the jury understood and followed the court's instruction in the absence of any showing to the contrary. [Citation.]" (*People v. Williams, supra,* 170 Cal.App.4th at p. 613.) The record contains no such showing here.

Appellants cite *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), in which the appellate court found that the admission of gang evidence violated due process and rendered the trial fundamentally unfair. (*Id.* at p. 232.) The court summarized the law applicable to a due process claim as follows: "To prove a deprivation of federal due process rights, [a defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is … whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citations.]' [Citation.]" (*Id.* at pp. 229-230, fn. omitted.)

With respect to the case before it, the court explained: "Certain gang evidence, namely the facts concerning the threat to police officers, the Mexican Mafia evidence and evidence identifying other gang members and their unrelated crimes, had no legitimate

purpose in this trial. The trial court's ruling on the new trial motion in which it broadly concluded the gang evidence was admissible to prove motive and intent for the underlying charges was arbitrary and fundamentally unfair. As we have concluded elsewhere, the prosecution did not prove that this gang evidence had a bearing on the issues of intent and motive. We thus discern 'no permissible inferences' that could be drawn by the jury from this evidence. [Citation.] From this evidence there was a real danger that the jury would improperly infer that whether or not Albarran was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished. Furthermore, this gang evidence was extremely and uniquely inflammatory, such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues. In our view, looking at the effect of this evidence on the trial as a whole, we believe that this prejudicial gang evidence was '"of such quality as necessarily prevents a fair trial."' [Citation.]" (*Albarran, supra,* 149 Cal.App.4th at pp. 230-231, fns. omitted.)

As we have explained, some gang evidence would have been properly admitted even if bifurcation of the gang enhancement allegations had been ordered. We cannot say evidence of gang benefit was wholly lacking; expanding a gang's territory or demonstrating it can reach far beyond its home turf seems beneficial to us. Nor can we say the nature and quantity of the evidence was such that it must have affected jurors' resolution of the substantive issues. In sum, and in contrast to *Albarran*, this case does *not* "present[] one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered [appellants'] trial fundamentally unfair." (*Albarran, supra,* 149 California at p. 232.)

B. <u>Identification Procedures</u>

Appellants contend that impermissibly suggestive procedures violated due process and tainted various identifications of them as the perpetrators. We conclude the identifications were properly admitted and that no due process violation has been shown.

1. General Legal Principles

"'[A] violation of due process occurs if a pretrial identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." [Citations.]'" (*People v. Sanders* (1990) 51 Cal.3d 471, 508; *Simmons v. United States*, (1968) 390 U.S. 377, 384.) A "defendant's protection against suggestive identification procedures encompasses not only the right to avoid methods that suggest the initial identification, but as well the right to avoid having suggestive methods transform a selection that was only tentative into one that is positively certain. [Citation.] While a witness is entitled to become surer of an identification, due process precludes the generation of that increased certainty through a suggestive [identification procedure]. [Citations.]" (*Raheem v. Kelly* (2d Cir. 2001) 257 F.3d 122, 135.)

"'"'In deciding whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court must ascertain (1) 'whether the identification procedure was unduly suggestive and unnecessary,' and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances."' [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942; see *Stovall v. Denno* (1967) 388 U.S. 293, 302, overruled on other grounds in *Griffith v. Kentucky* (1987) 479 U.S. 314, 320-328.) "The cases hold that despite an unduly suggestive identification procedure, we may deem the identification reliable under the totality of the circumstances, after we consider such factors as the witness's opportunity to view the suspect at the time of the offense, the witness's degree of attention at that time, the accuracy of the witness's prior description, the level of certainty the witness expressed when making the identification, and the lapse of time between the offense and the identification. [Citation.]" (*People v. Cook* (2007) 40 Cal.4th 1334, 1354; *Neil v.*

Biggers (1972) 409 U.S. 188, 199-200.)

The defendant bears the burden of demonstrating "'that the identification procedure resulted in such unfairness that it abridged his rights to due process. [Citation.]' [Citations.]" (*People v. Sanders, supra,* 51 Cal.3d at p. 508.) The defendant must show that the procedure was both unduly suggestive and unfair "'as a demonstrable reality, not just speculation.' [Citation.]" (*People v. Cook, supra*, 40 Cal.4th at p. 1355.) Contrary to Nichols's statement that the standard of review is unsettled, "[w]e review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive." (*People v. Gonzalez, supra,* 38 Cal.App.4th at p. 943; *People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.)

2. T.'s Identification of Dean[41]

a. *Background*

While Detective Blake was interviewing T. shortly after the homicide, other officers were attempting to develop possible suspects. Brocchini put together a photographic array based both on physical descriptions given by T. and on persons who had been suspected of committing robberies in Modesto in the recent past. It did not contain appellants. Blake showed it to T. about 1:40 a.m. She was unable to pick out anyone. Brocchini subsequently gave Blake four more photographic lineups, which Blake showed to T. that afternoon. One of the lineups contained five photographs, while the others contained six each. None were of appellants. T. did not select anyone.

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41 We assume appellants are not limited to challenging identifications of themselves, since, in light of other evidence linking them in commission of the crimes, the identification of one bolstered the prosecution's case against the others. (See *People v. Sanders, supra*, 51 Cal.3d at pp. 507-508.)

As the investigation focused on appellants, Blake obtained photographic lineups that included them. On the morning of March 7, 2002, he took People's exhibit 30-2, in which Dean's photograph appeared in the bottom right-hand corner, to T.'s house to show her.[42] Before showing her the photographs, Blake read her the standard so-called *Simmons*[43] advisement that admonished her that the fact the photographs were shown to her should not influence her judgment, and that it was as important to free innocent persons from suspicion as to identify guilty parties.[44] T. studied the photographs, then pointed to Dean's picture and said, "'He's one of them. He was in my house.'" T. said he was the person who took her to the master bath to be with her children, and who watched over her during the incident. She also said he shot from the outside into the closet door in the master bedroom. T. looked at the photographs for about two seconds; there was no hesitation in her identification. At trial, T. confirmed that she recognized Dean when viewing the photographs.

Appellants objected to People's exhibit 30-2, arguing that the photographic lineup was suggestive because Dean's photograph stood out from the others due to the degree of brightness in the picture.[45] Counsel for Dean described Dean's photograph as looking

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[42] Brocchini and Roldan put together this photographic lineup. Brocchini could not recall whether there were other pictures of Dean that could have been used, but believed he and Roldan used the most recent one Roldan had.

[43] *Simmons v. United States*, *supra*, 390 U.S. 377.

[44] Blake read the admonishment to T. directly from his card. At trial, he did not have the card with him and had to paraphrase.

[45] Appellants first raised the objection during the course of Roshyla's testimony, which preceded that of T. Our analysis applies equally to T.'s and Roshyla's identifications and, to the extent appellants complain that Collins identified Dean from an identical photographic lineup (People's exhibit 30-1), also to his identification. We have no trouble resolving the question of reliability in favor of admission of Collins's identification of Dean, inasmuch as the record shows Dean was at his house off and on throughout the day on March 1, and also showed up at his house after Trice was shot. Under these circumstances, the record establishes that Collins's in-court identification

"like the only one for which a flash unit was used." The prosecutor responded that, although the flash "lit [Dean] up," the array was not unduly suggestive because all of the photographs were of similar-looking individuals. The trial court examined the exhibit and found that the faces and hairstyles were all fairly similar, and that all of the individuals had facial hair; with respect to differences, Dean's picture was brighter than the others, and he was the only person wearing a white shirt. The trial court concluded that, looking at the lineup overall, it was not "unfair or necessarily something that would lead to an improper identification or that would make [Dean] quicker to be chosen because of those differences"; hence, there was no due process violation.

As set out in the statement of facts, *ante*, T. identified all three appellants at trial. She testified that she estimated she was at the doorway of the bathroom for around five minutes, and that about 10 minutes elapsed between when the intruders entered the house until Ruiz was shot.

b. *Analysis*

Appellants complain that the photograph of Dean contained in People's exhibit 30-2 stands out because it is brighter than the other photographs, and Dean is the only individual wearing a white shirt. They also contend that the fact a detective took the array to T.'s house in the middle of the day, four days after the homicide, implicitly telegraphed to her that there was a likely suspect in the lineup.

"To determine whether a procedure is unduly suggestive, we ask 'whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citations.]" (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 124.) We have examined the exhibit in question; all the photographs are of African-

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was based on an independent recollection of Dean. (See *People v. Contreras* (1993) 17 Cal.App.4th 813, 821; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1462.)

American males, generally of the same age, complexion, and build, and all with some sort of facial hair. Minor differences in facial hair, hair style, background color, and image size do not make a lineup suggestive. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217; see *People v. Holt* (1972) 28 Cal.App.3d 343, 350, disapproved on other grounds in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, fn. 6.) Similarly, a lineup is not made suggestive by the fact the defendant is the only participant wearing a certain type of clothing, at least where, as here, the clothing is neither distinctive nor does it match important elements of the description provided by the witness. (See *Foster v. California* (1969) 394 U.S. 440, 442-443; *People v. Gonzalez, supra,* 38 Cal.4th at p. 943-944; *People v. Carter, supra,* 36 Cal.4th at pp. 1162-1163; *People v. Johnson, supra,* 3 Cal.4th at p. 1217; *Raheem v. Kelley, supra,* 257 F.3d at pp. 134-135.) As for appellants' claim the circumstances under which the photographs were shown implicitly telegraphed to T. that there was a suspect in the lineup, "'[a]nyone asked to view a lineup would naturally assume the police had a suspect.' [Citation.] This circumstance does not render the lineup unduly suggestive. [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 699.)

This leaves us to consider the undeniable fact that Dean's photograph is brighter than the rest. Differences in images, such as discoloration, the size of the border around the photograph, and whether some images are glossy while others are not, are generally held to be "trivial distinctions [that] are immaterial. [Citation.]" (*People v. Carter, supra,* 36 Cal.4th at p. 1163; see, e.g., *People v. Gonzalez, supra,* 38 Cal.4th at p. 943; *People v. Johnson, supra,* 3 Cal.4th at p. 1217.) Here, Dean's photograph is only somewhat brighter than the photograph in the upper left-hand corner, and differences in photographic quality and lighting are apparent in all six photographs.

Even were we to find the photographic array somewhat suggestive, under the totality of the circumstances, and considering the factors set out in *Neil v. Biggers, supra,* 409 U.S. at pages 199-200, we find "no substantial likelihood" that T. (or R., for that matter) misidentified Dean when viewing the six photographs. (*People v. Cunningham*

(2001) 25 Cal.4th 926, 990; *People v. Sanders, supra,* 51 Cal.3d at pp. 508-509; see *People v. Phan, supra,* 14 Cal.App.4th at p. 1462.)[46] Accordingly, no due process violation as been shown.

3. R.'s Identification of Dean

a. *Background*

At the time Blake read the admonishment to T. and showed her People's exhibit 30-2, he and she were at the dining room table. R. and her brother were watching a videotape in the living room, just off of the dining area. The rooms are separated by a half wall and a step, so that the living room is about eight or nine inches lower than the dining room. The children were seated on a couch, facing the television, and appeared to be paying attention to it. The table where Blake and T. sat was about 20 feet away and behind the children. Blake was seated facing the living room, and he kept his eye on the children and paid attention to where they were while T. was looking at the photographs. When having different witnesses look at a lineup, Blake seeks to separate them so that they do not influence each other. He believed he was able to accomplish that in this instance. Generally speaking, the children were in a position in which they could not see what Blake and T. were doing. Blake did not believe the children could hear the exact

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46 Appellants cite *People v. Carlos* (2006) 138 Cal.App.4th 907 as a case in which the conviction was reversed because the photographic lineup procedure was impermissibly suggestive, and analogize the lighting in Dean's photograph to the placement, in *Carlos*, of the defendant's name under his photograph. (*Id*. at p. 912.) Differences in lighting and photographic quality are much more likely to occur, and much harder to guard against, than the placement of a name under a photograph. In any event, the court in *Carlos* found a due process violation not only because the defendant's photograph was made to stand out from the others, but also because the method of labeling was unnecessary, the photographic array was not disclosed to the defense until the first day of trial, defense counsel's request for a brief continuance was denied, and none of the witnesses identified the defendant at trial. (*Ibid*.) *Carlos* is clearly distinguishable from the case at bench.

words he and T. were using.

After T. finished looking at People's exhibit 30-2, she gave Blake a piece of evidence she had found. He and she were concentrating on that when R. came up to the table and looked at the lineup, which was lying by T.'s hand. R. pointed to Dean's picture and said, "'he was in my house.'" R. told Blake that after she had crawled out of the bathroom window, she saw two groups of men run past her. Dean was in the first group. It did not strike Blake as odd that R. used almost the same terminology as T.; in his experience, children mimic the type of language and grammar that their parents use or that they are around.

Appellants objected that R. saw T. make the identification and made the same identification for that reason; accordingly, R.'s identification was tainted. The prosecutor responded that the identifications were made separately. The trial court ruled that the jury should determine, as part of the case, whether R. was sufficiently isolated from T.'s identification.

At trial, R. testified that the man whose photograph she identified was the one who came into the room, went back out, and brought her mother in. She was "[r]eally sure" the man in the photograph was one of the robbers who was in the house that night. She also saw him again when she was on her way to the neighbor's house. He was one of the men by the fence. She saw him there for about 10 seconds. When shown People's exhibit 30-2 by the prosecutor, she identified the picture of Dean as being the person with the messed-up teeth who brought her mother into the room. She then identified Dean in court.

On cross-examination, R. testified that at the time she was shown the photographs, she was told to pick out a person who looked like he had been in the house. The investigator and T. were present when R. was shown the photographs, and T. was sitting next to R. R. thought the investigator had already shown photographs to T.; she did not know whether T. had picked any out because R. was not sitting next to T. the whole time.

Instead, R. was walking around the house and watching television. R. was in the living room and T.'s bedroom. A bar or divider separated the living room from the dining room, although R. was tall enough to see over it. R. testified that she and T. talked about what happened on the night Ruiz was shot; however, T. only asked what R. had seen, and did not tell R. what she (T.) saw.

b. *Analysis*

Appellants contend R.'s identification of Dean was tainted by her having seen her mother make an identification of Dean. The record does not support a conclusion that R. had any idea that T. had made an identification, let alone which photograph she chose. Under the circumstances, appellant has failed to show that the identification procedure was unduly suggestive or that R.'s identification of Dean was tainted. (See *People v. Cook, supra*, 40 Cal.4th at pp. 1354-1355; *People v. Clark* (1992) 3 Cal.4th 41, 136, fn. 17.) The jury was free to take the circumstances under which the identification was made, and Eisen's testimony, into account in determining the weight to give to R.'s identification of Dean.[47]

4. T.'s Identification of Nichols

a. *Background*

On March 4, 2002, Detective Owen showed T. People's exhibit 32-2, a photographic lineup in which Nichols's picture appears in the number 3 position. He first

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[47] Significantly, the trial court instructed the jury that factors to be considered in assessing eyewitness identification testimony included "the testimony of any expert regarding acquisition, retention, or retrieval of information presented to the senses," "[w]ere the photographic and physical lineups fair and were they conducted in a fair manner[,]" and "[w]as the witness's identification the product of his or her own recollection[.]" (See *People v. Ochoa* (1998) 19 Cal.4th 353, 413, fn. 4.)

gave her the *Simmons* admonishment, which in part explained that she was not obliged to pick out anyone, then asked her to think about the incident and focus on the suspect who was heavier set and older. T. said she could actually picture that person. She then looked at the photographs for 10 to 15 seconds and said that the skin tones of the suspect were lighter than those in the pictures. Owen then asked if, other than the skin tones, any of the photographs looked similar. According to T., she was able to eliminate all but photo 3 as not looking like anyone who was in her house. The complexion, cheeks, hairline, and "[e]verything" in that photograph was similar to one of the men who was in her house. She also specifically remembered the nose. She expressed a desire to be able to see a lineup in person. She wanted to see the full body of the man in photo 3, as she remembered him being heavy and having a potbelly or beer belly. She told Owen she recalled that his stomach jiggled when he moved, and he had a fat gut and fat sides.

A live lineup involving Nichols was conducted on May 2, 2002. Prior to the lineup, T. was admonished that she was not to assume that the person who committed the crime was among the group of individuals she would be shown, and that she was not obligated to identify anyone. At the lineup, she was shown six people. She identified Nichols. She also identified him (and the other appellants) at the preliminary hearing and at trial. There was no doubt in her mind once she saw Nichols in the live lineup that he was one of the people in her house. The individuals in the lineup were five feet 11 inches or six feet tall, except for one who was six feet four inches tall. Thus, none matched the description, height-wise, that T. gave in the first interview Blake conducted with her, in which she had described the person as having a light complexion and a beer belly, and being about five feet eight inches tall and 230 pounds.[48]

At trial, T. admitted having dated one of the participants in the lineup. She did not

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48 In Blake's opinion, Nichols had a medium complexion.

tell the officer that she recognized him. She did not think it was relevant, as she was looking for the person she saw in her home the night Ruiz died.

Appellants objected to the lineup as being inherently suggestive. The trial court overruled the objection.

b. *Analysis*

Relying in large part on the testimony of Dr. Eisen, an expert in eyewitness identification, appellants claim T.'s identification of Nichols was tainted. They point, inter alia, to the fact that Owen asked her whether any photographs looked similar to the suspect apart from skin tone, Nichols was the only person in the live lineup who had previously been displayed to T. in a photographic array, and one of the participants in the live lineup was several inches taller than the rest.

Contrary to appellants' apparent argument, Eisen's testimony permitted, but did not compel, a conclusion the identification procedures were impermissibly suggestive. "[F]or a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness – i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure." (*People v. Ochoa, supra,* 19 Cal.4th at p. 413.) In light of the fact differences in lighting and photographic quality can alter skin tones, we see nothing suggestive in what Owen said. Similarly, we find nothing suggestive in the state's apparent acquiescence to T.'s request to see Nichols in a live lineup. "Due process does not forbid the state to provide useful further information in response to a witness's request, for the state is not suggesting anything." (*Ibid.*) That Nichols was the only participant common to both the photographic array and the live lineup does not render the identification procedures impermissibly suggestive or per se violate due process. (*People v. Cook, supra,* 40 Cal.4th at p. 1355; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 789.)

Appellants have failed to establish a violation of due process. The value of Eisen's testimony was properly left to the jury to determine.

5. T.'s Identification of Trice

a. *Background*

When Brocchini created a photographic lineup for Trice, the only photograph of Trice he could find was from 1995. After Owen showed T. the photographic lineup that included Nichols's picture, he showed her People's exhibit 32-1, a photographic lineup in which Trice's picture appears in the number 5 position. T. looked at the lineup for 25 to 30 seconds and said that none of the people looked familiar. Owen observed, however, that she looked at picture 5 several times.[49] Not wanting to taint her identification by specifying the picture, he said that he noticed she kept looking at a particular photograph. She responded, "'Oh, you mean No. 5?'" He then asked why she looked back at that picture. She said the complexion, forehead, and hairline were the same, but she was not sure. She said she wanted to see the individual in person. T. told Owen that she could eliminate numbers 4 and 6 as not being the suspect, but none of the others.

At trial, T. recalled being able to eliminate all but number 5 as not having been in the house. She told the detective that number 5 looked like the person and that his features were very similar to what she had seen on one of the perpetrators. The main things were the forehead and hairline and the shape of the face. The complexion was similar, in that it was dark. T. told the detective that she wished she could do an in-person lineup, because she felt confident that she could pick out each individual in person. In person, she would be able to consider body type, height, and the way each stood.

b. *Analysis*

Despite the lack of objection in the trial court, appellants now contend, again based on Eisen's testimony, that T.'s identification of Trice was tainted because Owen

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[49] Owen knew, when he displayed the photographs, that Trice was in the number 5 position.

made comments that steered her to focus on Trice's photograph. Assuming the issue is properly before us on appeal, through a claim of ineffective assistance of counsel or otherwise (see, e.g., *People v. Williams* (1988) 44 Cal.3d 883, 906-907; *People v. Barber* (2002) 102 Cal.App.4th 145, 149-150), we find no impermissibly suggestive procedure. Owen did not steer T. to focus on Trice's photograph; she had already demonstrated an interest in it beyond that which she showed concerning the other pictures, and he simply asked why. He did not improperly suggest anything. (See *People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.) Once again, Eisen's testimony was properly left to the jury to assess.

To summarize, in no instance have appellants persuaded us that their rights to due process were violated. The trial court did not err in admitting the challenged identification evidence.

IV

TRIAL ISSUES

A. Admission of Testimony Based on Pathologist's and Criminalist's Reports

Appellants contend they were denied their confrontation rights when the trial court permitted expert witnesses to testify from reports made by other experts who did not testify. They argue that exclusion of the contents of the reports and the experts' testimony would have precluded conviction or, at least, affected the firearm enhancements. Respondent counters that appellants had the opportunity to "confront" the evidence contained in the reports when the experts testified. We conclude no prejudice has been shown.

1. Background

a. *The pathologist's report*

Dr. Rulon performed the autopsy on Ruiz. Detective Buehler testified that he attended the autopsy. Also present were a forensic photographer to document the autopsy procedure so that photographs were available if the case ended up going to court, and someone from the district attorney's office.

During the autopsy, Buehler observed three bullets being taken out of the body. One was taken from Ruiz's left pelvis, one from his left neck, and the third from his left armpit. Later that afternoon, Buehler was called back by Dr. Rulon and received a fourth bullet from her. Buehler, who the parties stipulated was an expert in identifying bullets, opined that the first three bullets came from a .22-caliber rimfire cartridge and would have been fired from the same type of firearm. The item he received from Rulon was a similar .22-caliber slug.

During trial, the prosecutor informed the court and defense counsel that Rulon had left the county and was unavailable to testify. As a result, the prosecutor intended to call Dr. Lawrence, her supervisor, to testify regarding her autopsy report, her observations, and various items of physical evidence. Appellants objected, citing *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). Following argument, and after reviewing *People v. Beeler* (1995) 9 Cal.4th 953 (*Beeler*), the trial court concluded that, as long as an appropriate foundation was laid, the autopsy report was admissible as a business record under Evidence Code section 1271. The court further determined that, assuming the proposed witness was trustworthy, testimony could be admitted from a doctor who did not perform the autopsy. Appellants argued that *Beeler* was no longer valid following *Crawford*, and that to permit a doctor to testify, without making an independent evaluation based on evidence other than the report, violated appellants' confrontation and due process rights. The prosecutor responded that the autopsy report was not testimonial and, hence, not subject to *Crawford*, and that in any event, *Crawford* would be satisfied because the defense would be able to cross-examine Lawrence. The court declined to change its ruling.

Lawrence subsequently testified that he was a forensic pathologist, i.e., a doctor who performed autopsies for the purpose of determining cause and circumstances of death. Forensic pathologists look at deaths that are of interest in the legal system.

In 2002, Rulon was an employee of Delta Pathology, which Lawrence founded

and owned. Technically, he was her boss. Rulon was a Board-certified pathologist and forensic pathologist like Lawrence, and she was fully experienced and performed throughout her employment in an exemplary fashion. Her reports followed Delta Pathology's protocol or procedure with regard to how autopsy reports should be prepared.

Rulon conducted an autopsy on Ruiz, and Lawrence reviewed her report.[50] Such reports are made in the regular course of Delta Pathology's business. Lawrence also looked at the autopsy photographs and reviewed the investigative information about the general circumstances of the case. Based on those items, he formed the opinion that the cause of Ruiz's death was multiple gunshot wounds.

Ruiz had a total of 11 entrance gunshot wounds on the body. Two were connected to one another, meaning he was struck nine, and possibly 10, times. Ruiz suffered fractures of the facial skeleton, perforation of the lung, and abdominal organ injuries. There were five fatal wounds, meaning they hit vital organs and caused extensive hemorrhage or organ destruction that caused death. Any one of the five could have killed Ruiz, although with good medical treatment, it was within the range of possibility that any given wound would not have been fatal. If Ruiz had received all of the wounds within a relatively short period of time, such as a minute, it was doubtful, but possible, that prompt medical attention could have saved his life. Several of the wounds had a downward trajectory. A couple had stippling, indicating they were fired probably from a distance of a foot or less.[51] If a bullet was not found within a wound, Lawrence could not tell the caliber of the gun. Generally speaking, Lawrence could not tell Ruiz's or the shooter's position just by looking at the wound, although it might be possible to say a

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50 The trial court granted appellants a continuing objection on confrontation grounds.

51 If someone were shot through a wall, there would normally not be stippling on the victim.

certain position was consistent or inconsistent with a particular wound.

The mechanism of death was shock and hemorrhage. It was due directly and primarily to the gunshot wounds. There was no significant natural disease that could have caused death. Lawrence could say with medical certainty that Rulon's opinion was the correct one.

Appellants reiterated their confrontation objections to Lawrence's testimony in conjunction with the trial court's determination that the death certificate for Ruiz would be admitted into evidence. They raised them again when the subject of admission of the autopsy report arose. When the trial court wondered why the report was needed when Lawrence's testimony had been admitted, the prosecutor observed that in *Beeler*, both the report and the testimony were admitted. The prosecutor expressed concern with laying the foundation for admissibility of Lawrence's testimony. Upon learning that enlargements of the diagrams attached to the report had been admitted into evidence, the trial court declined to admit the autopsy report. Appellants then withdrew their objections to the report. After defense counsel conferred, and apparently speaking for all of them, Nichols's attorney said: "We are going to go ahead, Your Honor, on this one we would, without waiving our issues with respect to the right of confrontation, we are – and in light of the testimony that was brought in by Dr. Lawrence, we withdraw our objection to receiving [the autopsy report]." Counsel explained: "The objection to the report was based on the denial of right of confrontation, and Dr. Lawrence was relying upon this report, Your Honor. We objected to any of his testimony and also objected to the admission of the report as a denial of confrontation. This Court has already, in essence, ruled against us on the issue of denial of confrontation. And since that ruling has, in essence, in my mind, already occurred, we are withdrawing our objection to the admissibility on all other grounds …." The prosecutor promptly withdrew the autopsy report, saying the defense could move it in on their own if they wanted. Counsel for Trice moved it into evidence without objection. When counsel for Nichols stated, "With

the previous notation about the right of confrontation," the prosecutor responded, "Which is now waived." The court cautioned that if there was no objection to the report, it would come in without preserving anything for the appeal, then admitted the autopsy report into evidence.

b. *The criminalist's report*

Ronald Welsh, a senior criminalist for the California Department of Justice, testified as a ballistics expert. In June 2003, he was asked to do further examination of firearms and cartridges relating to .380-caliber evidence. He received a Lorcin .380-caliber pistol from MPD. Apparently he was not present when it first came into the laboratory, and some other firearms examiners in the laboratory received the gun. Firearms normally are submitted to the property department, but this gun could not be unloaded and so needed to be examined immediately by a firearms examiner and rendered safe. According to the notes of Sarah Yoshida, an experienced firearms examiner with whom Welsh had worked for years and who had more years in firearms examination than he did, the pistol was jammed – basically rusted shut. The gun had to be forced open and a loaded cartridge (unfired bullet) driven out of the gun with a cleaning rod. The defense's hearsay and confrontation objections were overruled.

Welsh's examination of the gun showed its condition was consistent with long exposure to the elements. It was very rusty, with extreme corrosion in the chamber and barrel. Different parts of the gun were rusted in place. The gun's condition was consistent with it sitting outside in a field for six or eight months. Welch examined the cartridge and found it too was coated with rust. That rust was from the gun, because it was an aluminum cartridge case, which does not rust. Because the chamber had become pitted and rusty, it had damaged the cartridge and coated it with rust. The cartridge manufacturer was CCI. Welsh was also given a CCI Blazer .380 semiautomatic cartridge, which was evidence item number 46 in this case. The similarities between the two were that they were made by the same manufacturer and were the same caliber.

Welch was unable to perform any analysis to determine if there were any other points of similarity, since the majority of marks on a cartridge are left when it is fired. The one had not been fired, plus it was damaged from the rust.

2. Analysis

The confrontation clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." Until 2004, when *Crawford* was decided, the admission of an unavailable witness's out-of-court statements against a criminal defendant was governed by *Ohio v. Roberts* (1980) 448 U.S. 56 (*Roberts*), which held that such statements could be admitted consistent with the confrontation clause only when the evidence fell within "a firmly rooted hearsay exception," or the statements contained "particularized guarantees of trustworthiness" such that adversarial testing would add little to the statements' reliability. (*Id.* at p. 66, fn. omitted.)

Beeler, *supra*, 9 Cal.4th 953, was decided in 1995, while *Roberts* was still controlling. In *Beeler*, Dr. Bolduc, the pathologist who conducted the autopsy on the victim, did not testify at trial. Instead, the prosecutor called a pathologist who did not participate in the autopsy to testify regarding the autopsy report. The report itself was admitted, over the defendant's objection, under Evidence Code section 1271.[52] On appeal, the defendant claimed admission of the report was error for various reasons,

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[52] Evidence Code section 1271 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." An analogous exception to the hearsay rule is contained in Evidence Code section 1280, which covers writings made by and within the scope of duty of public employees

including violation of the defendant's right to confront and cross-examine Bolduc. (*Beeler*, *supra*, at p. 978.) The California Supreme Court found no error. It examined the requirements of Evidence Code section 1271, and found that none of Bolduc's conclusions, including those with regard to the cause of death, were inadmissible under that statute. (*Beeler*, *supra*, at p. 981.) Since the report was properly admitted under Evidence Code section 1271, the court further concluded, the defendant's right of confrontation was not violated. (*Beeler*, *supra*, at p. 980.)

In *Crawford*, *supra*, 541 U.S. 36, the United States Supreme Court repudiated *Roberts* and held that testimonial out-of-court statements offered against a criminal defendant are inadmissible under the Sixth Amendment unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford*, *supra*, at pp. 59, 68.) Where nontestimonial hearsay is at issue, evidence is exempt "from Confrontation Clause scrutiny altogether" and may be admitted pursuant to the hearsay law. (*Id*. at p. 68.) The court declined to give a precise definition of "testimonial statements," although "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'" was given as one formulation of the phase. (*Id*. at pp. 51-52.)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the United States Supreme Court expanded on *Crawford*. Although declining to attempt to classify all conceivable statements – even those made in response to questioning by police – as either testimony or nontestimonial, it did further define the categories, saying: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis*, *supra*, at p. 822, fn. omitted.)

Davis applied these distinctions to two factual situations to determine "when statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' and thus subject to the requirements of the Sixth Amendment's Confrontation Clause." (*Davis*, *supra*, 547 U.S. at p. 817.) *Davis* held that the tape recording of a domestic disturbance victim's telephone call to a 911 operator was not testimonial under *Crawford*, even though the 911 operator asked the victim questions about the incident, because a 911 call is usually not designed primarily to establish a past fact, but to describe current circumstances that require police assistance. (*Davis*, *supra*, at pp. 817-819, 827.) The victim on the 911 call was "speaking about events *as they were actually happening*, rather than 'describ[ing] past events' … [citation]." (*Id.* at p. 827.) In contrast, a domestic violence victim's statements to police officers, given in the course of their investigation, were testimonial and inadmissible in the absence of the victim's trial testimony, because the victim spoke to officers about the assault after the incident happened, she gave her statements to the officers as part of an investigation into possible past criminal conduct, and there was no emergency in progress and no immediate threat to the victim. (*Id*. at pp. 819-821, 829-830.)

In *People v. Cage* (2007) 40 Cal.4th 965, the California Supreme Court derived several basic principles from *Davis*. "First, …, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony – to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably

bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*People v. Cage*, *supra*, at p. 984, fns. omitted.)

In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), the California Supreme Court addressed an issue arising under *Crawford* that did not involve statements given to law enforcement officials. In *Geier*, an expert testified to her opinion concerning a DNA match and its statistical significance, based on testing she did not personally conduct. The testifying expert was the laboratory director for an accredited private laboratory that performed DNA tests for both the prosecution and the defense, and she reviewed the work performed by the analyst who conducted the actual tests. At trial, the defendant objected to the expert's testimony, arguing the evidence violated his Sixth Amendment rights because she did not personally conduct the tests. (*Geier*, *supra*, at pp. 593-596.)

Geier reviewed *Crawford* and *Davis* with respect to whether a statement is testimonial under the Sixth Amendment and stated: "[W]hat we extract from those decisions is that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier*, *supra*, 41 Cal.4th at p. 605.) Based on this interpretation, the California Supreme Court concluded that the circumstances under which the testing analyst prepared the DNA report meant such evidence was not testimonial. (*Id*. at p. 607.) The court emphasized that the observations of the person who actually conducted the testing and prepared the report "constitute a

contemporaneous recordation of observable events rather than the documentation of past events. That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks. 'Therefore, when [she] made these observations, [she] – like the declarant reporting an emergency in *Davis* – [was] "not acting as [a] witness [ ];" and [was] "not testifying."' [Citation.]" (*Geier, supra*, at pp. 605-606.)

The state high court acknowledged that the DNA report was requested by a police agency and the laboratory's employees were paid for their work as part of a government investigation. (*Geier, supra*, 41 Cal.4th at p. 605.) It concluded, however, that "'the proper focus [about whether an out-of-court statement is testimonial] is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial.' [Citations.]" (*Ibid*.) "In our view, under *Davis*, determining whether a statement is testimonial requires us to consider the circumstances under which the statement was made. As we read *Davis*, the crucial point is whether the statement represents the contemporaneous recordation of observable events." (*Geier, supra,* at p. 607.) *Geier* held the analyst's notes were admissible because they "were made 'during a routine, non-adversarial process meant to ensure accurate analysis.' [Citations.] In simply following [the laboratory's] protocol of noting carefully each step of the DNA analysis, recording what she did with each sample received, [the analyst] did not 'bear witness' against defendant. [Citation.] Records of laboratory protocols followed and the resulting raw data acquired are not accusatory. 'Instead, they are neutral, having the power to exonerate as well as convict.' [Citation.]" (*Ibid*.)

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*), a case decided after appellants were convicted but while the instant appeal was pending, the prosecution introduced three notarized "'certificates of analysis'" that showed the results of forensic analysis performed on material seized by police and connected to the defendant. The certificates, which were admitted over the

defendant's Sixth Amendment objection, reported the weight of the seized bags, and that the substances were examined and found to contain cocaine. The certificates complied with state law and were sworn before a notary public by analysts from the state's crime laboratory, but no analyst testified at trial. (*Id*. at pp. 2530-2531.)

The United States Supreme Court held that admission of the certificates, in the absence of the trial testimony of the analysts who tested the contraband, violated the defendant's Sixth Amendment rights because there was "little doubt" the certificates fell "within the 'core class of testimonial statements'" subject to the Sixth Amendment restrictions described in *Crawford*. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) "The 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' [Citation.]" (*Ibid*.) While state law described the documents as "'certificates,'" *Melendez-Diaz* held they were "quite plainly affidavits" and "'"made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."' [Citation.]" (*Ibid*.) Moreover, the "sole purpose" of the affidavits under state law "was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance [citation]." (*Ibid*., italics omitted.)

The high court rejected the argument that there is a difference, for confrontation clause purposes, between testimony recounting historical events and testimony that is the result of neutral, scientific testing, finding it "little more than an invitation to return to our overruled decision in *Roberts*, [*supra*,] 448 U.S. 56." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2536.) The court also rejected the argument that the affidavits were admissible without confrontation because they were akin to official and business records: "Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. [Citation.] But that is not the case if the regularly conducted business activity is the production of evidence for use at trial." (*Id*. at p. 2538.) "Business and public records are generally admissible absent confrontation not because

they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at [the defendant's] trial – were testimony against [him], and the analysts were subject to confrontation under the Sixth Amendment." (*Id*. at pp. 2539-2540.)

Justice Scalia's plurality opinion in *Melendez-Diaz* was joined by three other justices. Justice Thomas filed a short concurring opinion, which stated that he joined the court's opinion "because the documents at issue in this case 'are quite plainly affidavits,' [citation]. As such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).)[53]

At the time the United States Supreme Court decided *Melendez-Diaz*, a petition for writ of certiorari in *Geier* was pending before the court. The court denied the petition, without comment, four days after deciding *Melendez-Diaz*. (*Geier v. California* (2009) ___ U.S. ___ [129 S.Ct. 2856].) California's intermediate courts have since come to differing conclusions concerning *Geier*'s continuing viability following *Melendez-Diaz*, and the California Supreme Court has granted review in a number of cases in order to address the issue. (E.g., *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886; *People v. Lopez* (2009) 177 Cal.App.4th 202, review

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53 The four dissenting justices complained that the majority was sweeping away "an accepted rule governing the admission of scientific evidence" that had been in existence for at least 90 years, despite the fact *Crawford* and *Davis* said "nothing about forensic analysts …." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (dis. opn. of Kennedy, J.).) The dissent concluded that *Crawford*'s definition of testimonial evidence should be limited to "conventional" witnesses who have "personal knowledge of some aspect of the defendant's guilt …." (*Melendez-Diaz*, *supra*, at p. 2543 (dis. opn. of Kennedy, J.).)

granted Dec. 2, 2009, S177046; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620; *People v. Bowman* (2010) 182 Cal.App.4th 1616, review granted June 9, 2010, S182172.)[54]

In the present case, with respect to the autopsy evidence, Lawrence did not simply testify as a proxy for Rulon. Instead, he reviewed the autopsy photographs in addition to her report, and was able to offer his own opinion concerning the severity of Ruiz's wounds and the cause of death, and as to whether Rulon's conclusions were correct. We need not decide whether these circumstances are significant, nor do we need to take sides in the debate over *Geier* or, for that matter, offer our opinion concerning the continued vitality of cases such as *Beeler* and *People v. Clark, supra,* 3 Cal.4th 41, at pages 158-159, which, like *Beeler*, deals with one physician testifying about the report of the physician who actually conducted the autopsy, and admission of that report as a public or business record: Assuming error, it did not prejudice appellants.

A violation of the confrontation clause is subject to harmless-error analysis under the *Chapman* standard. (*Geier*, *supra*, 41 Cal.4th at p. 608; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1225 & fn. 42; see *People v. Ledesma* (2006) 39 Cal.4th 641, 709.) The question is whether we can find, beyond a reasonable doubt, "that the jury verdict would have been the same absent any error. [Citations.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 239.)

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54 Review was denied in *People v. Vargas* (2009) 178 Cal.App.4th 647, in which the Court of Appeal remarked that "[t]he reasoning of the majority in *Melendez-Diaz* is inconsistent with the primary rationale relied upon by the California Supreme Court in *Geier* to uphold the introduction of the DNA report in that case …. Nevertheless, because of the limited nature of Justice Thomas' concurrence, the precedential value of the majority's analysis on this point is unclear as applied to a laboratory analyst's report or a similar forensic report …." (*People v. Vargas*, *supra*, at p. 659.) *Vargas*'s discussing of the issue is dicta, since the court concluded the challenged evidence was testimonial even if analyzed under *Geier* and *People v. Cage*, *supra*, 40 Cal.4th 965. (*People v. Vargas*, *supra*, at p. 660.)

The answer here is yes. With respect to the autopsy evidence, appellants not only withdrew their objections to admission of Rulon's report itself, but Trice actually moved it into evidence without objection from any other party. Once received without objection, the report was in evidence for all purposes. (See *Wicktor v. Los Angeles County* (1960) 177 Cal.App.2d 390, 406; *People v. O'Brien* (1932) 122 Cal.App. 147, 155; *People v. Hickok* (1921) 56 Cal.App. 13, 17.) Appellants could not affirmatively seek admission of the report while still preserving their Sixth Amendment objections thereto.

Once the autopsy report was in evidence, any error in admitting Lawrence's testimony cannot possibly have impacted the verdict, since the pertinent evidence was already before the jury in the form of Rulon's report. Moreover, appellants did not seriously dispute that Ruiz was shot to death or that he was shot multiple times.[55] (See *People v. Williams* (1959) 174 Cal.App.2d 364, 391.) Berenice Sanchez, the Ruizes' neighbor, described seeing Ruiz bleeding from the chest. The first officers on the scene testified that Ruiz had been shot and was bleeding profusely. Detective Buehler witnessed three .22-caliber slugs being recovered from Ruiz's body during the autopsy, including one from the neck. Neither the autopsy report nor Lawrence's testimony shed any light on whether Ruiz was shot by multiple firearms; Lawrence explained that unless a bullet was found in a wound, he could not determine the caliber of the gun.[56] Testimony concerning the trajectory of the shots and stippling (or absence thereof) added little or nothing. Lawrence's testimony (based on the report) that Ruiz was six feet tall and approximately 240 pounds was elicited by Nichols and can only have been beneficial

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55 Indeed, Dean's attorney told jurors, in his opening statement, that Ruiz "ended up with a bunch of gunshot wounds to him that killed him," but that there was no physical evidence appellants were responsible.

56 In his argument to the jury, the prosecutor conceded that he could not say any particular defendant was the actual killer, or that, for example, Nichols had the .22, fired nine rounds, and those killed Ruiz.

to him, as it enabled him to attack T.'s identification of him as one of the perpetrators by suggesting he was about Ruiz's size and not around the five feet eight inches that was contained in T.'s original description to police.

With respect to the evidence concerning the Lorcin pistol, appellants do not explain, and we fail to see, how Welsh's testimony concerning Yoshida's report had any effect whatsoever. Herbert Brownlee testified to the gun's condition when he found it, including the fact it had a live round in the chamber. That Welsh personally examined the gun himself is clear from his statement that he disassembled the weapon, and none of his conclusions about the gun or the cartridge were dependent upon Yoshida's report or the notes of any other firearms examiners.

B. Failure to Instruct on Accomplice Testimony

Collins's testimony is described at length in the statement of facts, *ante*. At the conclusion of the evidence, the trial court instructed the jury that the testimony of only one witness can prove any fact. It did not instruct, and was not requested to instruct, on accomplice testimony. Appellants now say the trial court erred by failing to instruct, sua sponte, on accomplice testimony with respect to Collins. We disagree.

"The relevant principles governing accomplice testimony are well settled. No conviction can be had upon the testimony of an accomplice unless such testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense …." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.) "Section 1111 defines an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' In order to be chargeable with the identical offense, the witness must be considered a principal under section 31. That statute defines principals to include '[a]ll persons concerned in the commission of a crime … whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission ….' [Citations.]" (*People v.*

Horton (1995) 11 Cal.4th 1068, 1113-1114.) To be an accomplice, the witness "must have '"guilty knowledge and intent with regard to the commission of the crime."' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 369; *People v. Gordon* (1973) 10 Cal.3d 460, 466-467, disapproved on other grounds in *People v. Ward* (2005) 36 Cal.4th 186, 212.) An accessory, defined as a person "who, after a felony has been committed, harbors, conceals or aids a principal in such felony," with the intent that the principal avoid criminal liability therefor, and with knowledge that the principal has committed or been charged with or convicted of the felony (§ 32), is not liable to prosecution for the identical offense, and so is not an accomplice (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 103; *People v. Horton, supra,* 11 Cal.4th at p. 1114).

"A trial court 'must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial.' [Citation.]" (*People v. Avila, supra,* 38 Cal.4th at p. 567.) Accordingly, if there is evidence from which the jury could find, by a preponderance of the evidence, that a witness is an accomplice, the trial court must instruct the jury on accomplice testimony. (*Ibid.*; *People v. Hinton* (2006) 37 Cal.4th 839, 879; *People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271.)[57] "[A] witness's status is a question for the jury if there is a genuine evidentiary dispute and if 'the jury could reasonably [find] from the evidence' that the witness is an accomplice. [Citations.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1174.) Evidence supporting the inference that the witness shared the defendant's criminal purpose or intended to commit, facilitate, or encourage the crime must be substantial. (See *People v. Lewis, supra,* 26 Cal.4th at p. 369; *People v. Howard, supra,* 1 Cal.4th at p. 1174.) "Substantial evidence

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57 The defendant has the burden of establishing that a witness is an accomplice. If the prosecution introduces evidence establishing accomplice status by a preponderance of the evidence, however, the defendant's burden is satisfied. (*People v. Jacobs* (1991) 230 Cal.App.3d 1337, 1342.)

is 'evidence sufficient to "deserve consideration by the jury," not "whenever *any* evidence is presented, no matter how weak."' [Citation.]" (*People v. Lewis, supra*, 26 Cal.4th at p. 369.) Speculation is not enough (*ibid.*), nor is inference '"'"based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work."'" [Citation.]" (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1604, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867.) If the evidence is insufficient as a matter of law to support a finding that the witness is an accomplice, "the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony. [Citation.]" (*People v. Horton, supra*, 11 Cal.4th at p. 1114.)

Appellants offer a plethora of reasons why the jury could have concluded Collins was an accomplice. Whether considered singly or in combination, they give rise to nothing more than speculation and suspicion. They certainly do not constitute substantial evidence that Collins aided and abetted appellants. (See *People v. Horton, supra*, 11 Cal.4th at pp. 1115-1116.) At most, Collins's failure initially to tell Helton and Brocchini what he knew could conceivably have made him an accessory. (See *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1220.) That is not enough.

Assuming, however, that error occurred, "[a] trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is 'sufficient corroborating evidence in the record.' [Citation.] To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] '"[T]he corroborative evidence may be slight and entitled to little consideration when standing alone." [Citation.]' [Citation.]" (*People v. Avila, supra*, 38 Cal.4th at pp. 562-563.) "The evidence 'is sufficient if it tends to connect the defendant with the crime in

such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Lewis, supra,* 26 Cal.4th at p. 370; *People v. Sanders* (1995) 11 Cal.4th 475, 535.) We review the entire record to determine whether sufficient evidence of corroboration exists. (*People v. Frye* (1998) 18 Cal.4th 894, 966, disapproved on other grounds in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

The most obvious corroboration as to all three appellants is the eyewitness identifications of T. and R., which, contrary to appellants' claims, were not tainted. (See discussion, *ante*.)[58] In addition, Trice's own testimony furnished corroboration with respect to himself (see *People v. Channell* (1951) 107 Cal.App.2d 192, 197), and Dean's attempt to manufacture a false alibi – supporting, as it did, an inference of consciousness of guilt – constituted corroboration as to him (see *People v. Perry* (1972) 7 Cal.3d 756, 771-772, overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 28, 34).

In short, Collins's testimony was amply corroborated by other evidence of appellants' guilt. Moreover, in light of the myriad reasons jurors had to question Collins's credibility, it was not necessary to instruct the jury to view his testimony with caution or distrust. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1025.) Any error in failing to give accomplice testimony instructions was harmless. (*Ibid*.)

C. <u>Prosecutorial Error</u>

Appellants contend their convictions cannot stand due to what they perceive as

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58 Although Collins may have given police monikers and descriptions that, through further investigation, led to appellants' photographs being shown to, and identified by, T. and Roshyla, this does not mean those identifications were not independent evidence. An accomplice's "testimony," for purposes of this issue, "'"includes all oral statements made by an accomplice or coconspirator under oath in a court proceeding *and* all out-of-court statements of accomplices and coconspirators *used as substantive evidence of guilt* which are made under suspect circumstances."' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 682, second italics added; see also *People v. Andrews* (1989) 49 Cal.3d 200, 214.) Collins's statements to police were not used as substantive evidence of guilt.

numerous instances of prosecutorial misconduct or other error. We conclude that while some error occurred, reversal is not warranted.

1. Display of Jail Photograph

a. *Background*

Appellants appeared before the jury unshackled and in street clothing. During Okamoto's gang testimony, the prosecutor elicited that Okamoto had seen photographs of Nichols's tattoos. People's exhibit 70-6 was then shown to the witness and also displayed on a screen for the jury. Counsel for Nichols objected to the display of the photograph, and also asserted it had been sitting at counsel table by the prosecutor, in view of the jury. The photograph (which we have viewed) shows Nichols in a red-and-white-striped jumpsuit, with his hands cuffed to the front. This ensued:

> "THE COURT: Mr. Maner [prosecutor], is this a picture of a tattoo you're showing?
>
> "MR. MANER: No. [¶] … [¶] It shows who the tattoos belong to. The first picture is going to be a picture –
>
> "THE COURT: Is this something you cleared with everybody before you showed to the jury?
>
> "MR. CHASE [counsel for Nichols]: No.
>
> "MR. MILLER [counsel for Dean]: No.
>
> "MR. TRIMBLE [counsel for Trice]: No.
>
> "MR. MANER: This is – I mean, we've discovered this and we've gone over this in advance, Judge.
>
> "THE COURT: We have not –
>
> "MR. MILLER: Not an answer to the Court's question.
>
> "(Counsel speaking simultaneously.)
>
> "THE COURT: Hang on just a second.
>
> "MR. MANER: Okay, I'll minimize the screen, but here's my point,

Judge –

"THE COURT: Just a second please.… [¶] … [¶] But it is, I think, … inappropriate, … and I think you're aware it's inappropriate to show pictures to the jury that haven't been cleared by the Court, and none of those have been.

"MR. MANER: They – I'm sorry Judge.

"THE COURT: So I'm going to sustain the objection.

"MR. MANER: I'll show it to defense counsel now. We've marked it as exhibits previously, defense counsel knew they were coming, and in my mind it's – shouldn't be a surprise. But if they need a minute to –

"THE COURT: If something's not in evidence, Mr. Maner, it shouldn't be shown to the jury.

"MR. MANER: Okay.

"THE COURT: So consider yourself chastised. Ladies and gentlemen, please disregard any pictures you saw on the screen there that weren't –

"MR. CHASE: And also on his counsel table where he had it sitting there waving at the jury.

"MR. MANER: I didn't wave a thing at the jury.

"THE COURT: There was nothing being waved, but you do need to be aware of that and be careful with that as well too."

Nichols's attorney stated he was not contesting that the photographs were of Nichols, and there was no objection to the photographs of the tattoos themselves. He did, however, move for a mistrial based on what had happened. The court deferred that matter and allowed the prosecutor to proceed with photographs of the tattoos.

Later, outside the presence of the jury, the prosecutor apologized, explaining that he had assumed there would be no objection, because he had had the photographs marked as exhibits and defense counsel had seen them. The court observed that "we're kind of going back to trial procedure 101 here. And I think it's just a matter of common courtesy

and trial procedure that you don't show things to the jury that haven't either been cleared by counsel … or we need to talk about this first, or whatever." The court noted that the photograph was displayed on the screen for five minutes or less, and concluded that any actual prejudice was de minimis, since "the fact that the defendants are in custody is usually the worst kept secret during pretty much any trial," and custodial status generally did not bother jurors one way or the other. The court warned, however, that it sent a subliminal message when jurors saw defendants in chains or in custody, and that "it just is simple trial procedure 101 that you have to be careful about what they can see and what they can't see."

Prior to the conclusion of trial, Nichols filed a written motion for dismissal or other sanctions due to prosecutorial misconduct. One of the grounds listed was the display of the photograph. In opposition, the prosecutor asserted that the defense's claim that the photograph had been displayed to the jury before it was admitted into evidence or shown to defense counsel was untrue, as the photographs were submitted and marked as exhibits and shown to defense counsel.[59] The court denied the motion based on that issue alone, and also after considering the potential for cumulative prejudice.

The showing of the photograph was one of the grounds raised in the motions for new trial. In its ruling denying the motions, the court noted: "As stated by the Court at the time, the Court felt that the violation was de minimus [*sic*]. However, the Court believes that a prosecutor of Mr. Manor's [*sic*] skill level should have known better, and does believe that the incident was a deliberate attempt to portray the defendants in an unfavorable light. As such, the Court did chastise the DA in the presence of the jury. The Court believes that any taint from the incident was cured by the sanction and did not

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59 The record does not explain the prosecutor's apparent inability to appreciate the difference between having an exhibit marked for identification, and actually having the exhibit admitted into evidence.

result in undue prejudice."

Nichols and Trice now contend the prosecutor's wrongful display of the photograph irreparably tainted the trial. We agree that the prosecutor erred, but find the incident not prejudicial in and of itself. (With respect to this and other claims of error, we will address cumulative prejudice later in this opinion.)

b. *Analysis*

The United States and California Supreme Courts have long held that an accused may not be compelled, over objection, to stand trial before a jury while dressed in identifiable prison/jail clothing. (*Estelle v. Williams* (1976) 425 U.S. 501, 512-513; *People v. Taylor* (1982) 31 Cal.3d 488, 494, 495; cf. *People v. Duran* (1976) 16 Cal.3d 282, 290-291 [defendant cannot be subjected to physical restraints in courtroom, while in jury's presence, absent showing of manifest need].) Such a practice violates due process by creating an intolerable risk of undermining the presumption of innocence, and also impinges upon tenets of equal protection. (*People v. Taylor, supra,* 31 Cal.3d at pp. 494, 495; see *Estelle v. Williams, supra*, 425 U.S. at pp. 504-506.) Accordingly, when such error occurs, its effect must be assessed against the "harmless-beyond-a-reasonable-doubt" standard of *Chapman, supra,* 386 U.S. at page 24 (*People v. Taylor, supra*, at pp. 499-500), and the error is not automatically cured by the giving of an instruction that the jury is not to be influenced by the fact of the defendant's arrest (*id.* at p. 501; cf. *People v. McDaniel* (2008) 159 Cal.App.4th 736, 746-747).

The foregoing cases, however, all deal with situations in which the defendant appeared in jail clothing (or shackles) before the jury *throughout the trial*. This fact is significant. As the United States Supreme Court stated: "[T]he *constant reminder* of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a *continuing influence throughout the trial* that … an unacceptable risk is presented of impermissible factors coming into play. [Citation.]" (*Estelle v. Williams, supra,* 425 U.S. at pp. 504-505, italics added.) In

the present case, by contrast, while there can be no doubt that the prosecutor erred by displaying the photograph (see *People v. Bradford* (1997) 15 Cal.4th 1229, 1336-1337), the jury saw it for at most a few minutes. While we have not found (or been cited to) any California cases dealing with a jury's brief viewing of a defendant in jail garb, the California Supreme Court has held on a number of occasions that prejudicial error does not occur merely because jurors briefly see a defendant in shackles. (E.g., *People v. Ochoa, supra,* 19 Cal.4th at p. 417; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 584, affd. *sub nom. Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Duran*, *supra*, 16 Cal.3d at p. 287, fn. 2.) The Ninth Circuit Court of Appeals has similarly so held. (E.g., *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1133.) Other states have found no prejudice arising from the brief sight of a defendant in jail garb. (E.g., *State v. Taylor* (Tenn. 2007) 240 S.W.3d 789, 794-796; *State v. Schaller* (Wis.App. 1995) 544 N.W.2d 247, 256-257; but see *Ex parte Clark* (Tex.Cr.App. 1977) 545 S.W.2d 175, 176-177.)

We are at a loss to understand why a prosecutor would run the risk of showing such a photograph to the jury when it had not been admitted into evidence. Nevertheless, we have no trouble concluding the incident was not prejudicial in and of itself. Jurors saw the picture for a matter of minutes in a trial that lasted months. Jurors were instructed, both at the outset of trial and at the conclusion of evidence, on the presumption of innocence and that they were not to be biased against defendants because they had been arrested. Jurors are presumed to follow instructions (*Weeks v. Angelone* (2000) 528 U.S. 225, 234), and in light of the brevity of the incident here, we have no reason to conclude they did not (compare *People v. Taylor*, *supra,* 31 Cal.3d at p. 501; *People v. McDaniel, supra,* 159 Cal.App.4th at pp. 746-747). This is especially true since the trial court chastised the prosecutor in front of them. (See *People v. Kennedy, supra,* 36 Cal.4th at p. 625.) Significantly, by the time the photograph was shown, Nichols's and Trice's attorneys had already questioned Detective Blake about whether

appellants were wearing red jumpsuits and shackles at the preliminary hearing. Even assuming, to the extent they gave it any thought at all, jurors would not have simply presumed appellants were in custody, given the severity of the charges against them – which seems unlikely – they would already have learned appellants were in custody at some point. Under the circumstances, a brief visual confirmation of that knowledge cannot have abridged appellants' constitutional rights or prejudiced them. (See *State v. Taylor*, *supra*, 240 S.W.3d at p. 796; *State v. Schaller*, *supra*, 544 N.W.2d at pp. 256-257.)

2. Violation of Court Order

a. *Background*

In connection with the gang allegations, the prosecutor elicited testimony from Okamoto regarding appellants' criminal records. While showing Okamoto court records regarding one of Trice's convictions, the prosecutor asked, without objection: "And does it also show that he pled guilty to a violation of Penal Code Section 664 slash 213(a) (1), *attempted home invasion robbery*, and that he pled guilty on February 26th, 1996, for a crime that occurred exactly one year earlier, on February 26th, 1995?" (Italics added.) Okamoto responded affirmatively.

Later, the prosecutor brought up the admissibility of a chart in which he had summarized Okamoto's opinion as it related to predicate acts. Counsel for Trice objected to use of the term "attempted home invasion robbery" and argued that there was no such thing. Counsel for Nichols asserted that the actual crime was called attempted first degree robbery. The prosecutor agreed to reword the reference and print out another chart. The court agreed, and directed him to "stick with" what the code section said, i.e.,

attempted first degree robbery.[60] The court subsequently confirmed, during a discussion of whether the chart would be admitted into evidence so it could be used in examination of the expert, that the conviction was to be listed as attempted first degree robbery. The prosecutor again agreed to submit a chart incorporating the change.

As set out in the statement of facts, *ante,* Trice testified on his own behalf. During cross-examination, the prosecutor asked about his felony convictions. This ensued:

> "Q. Were you convicted of attempted home invasion robbery or –
>
> "MR. TRIMBLE: Judge, I'm going to object to that. Mr. Maner knows better than that.
>
> "THE COURT: It's sustained. [¶] … [¶]
>
> "MR. MANER: Q. Where you attempted to –
>
> "MR. TRIMBLE: Judge, I'm going to 352 this. He knows what he's entitled to ask and what he's not, and he's asking stuff he shouldn't go into.
>
> "MR. MANER: That's not true, Judge. I think I slipped on the home invasion but –
>
> "MR. CHASE: He did it again, Your Honor.
>
> "MR. TRIMBLE: Gee, that's too bad, he did it again, Judge.
>
> "THE COURT: The offense was 664/211, correct?
>
> "MR. MANER: Yes, Judge – I think it's 213, actually.
>
> "THE COURT: Let's go ahead and stick to that offense, then. And the jury's instructed to disregard the question."

The prosecutor then elicited from Trice his conviction for attempted first degree robbery. In his argument to the jury, the prosecutor referred to the current incident as "a

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60 The court was concerned with the similarity of the prior conviction to the charged offenses. During the course of trial, at least two witnesses used the term "home invasion" in referring to the present incident.

home invasion robbery, a murder, a murder during the course of a robbery …."

Trice raised the prosecutor's asserted violation of the court's order in his new trial motion. Nichols joined. In its ruling denying the motions, the court concluded: "The matter was addressed at trial when it arose, and the Prosecutor claimed that these [references] were inadvertent, and the Court accepts this representation at face value. Viewing the trial process as a whole, the Court does not believe that the term was repeated so much that it rendered the proceedings fundamentally unfair or caused any confusion in the jury's mind between the prior and the charged offense."

Nichols and Trice now contend the prosecutor committed prejudicial misconduct by violating the court's order. We again agree that error occurred, but again conclude the incident was not prejudicial in and of itself.

b. *Analysis*

Whether intentional or not, the prosecutor committed misconduct by violating the trial court's ruling that Trice's prior offense should be referred to as attempted first degree robbery. (See *People v. Friend* (2009) 47 Cal.4th 1, 33; accord, *People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Ochoa, supra,* 19 Cal.4th at p. 430.) However, jurors had already heard unobjected-to testimony that Trice pled guilty to attempted home invasion robbery; the prosecutor's references were brief in a lengthy trial; the exchange between the court and counsel, which occurred in the jury's presence, made it clear the prosecutor's question was improper; and the jury was instructed to disregard the question. (See *People v. Tafoya* (2007) 42 Cal.4th 147, 180; *People v. Montiel* (1993) 5 Cal.4th 877, 931; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250-1251.) Under the circumstances, no prejudice appears.

3. Presentation of Incorrect and Misleading Testimony and Argument

Appellants contend they are entitled to reversal because the prosecutor presented false and misleading information in his opening statement, presented and failed to correct inaccurate and misleading testimony, and then exploited the errors in his argument to the

jury. We disagree.

a. *Background*

The errors claimed were all raised in appellants' motions for new trial and were rejected by the trial court, except to the extent they contributed to its decision to strike the gang enhancements. The errors claimed, and what the record shows, are:

(1) Appellants complain that in his opening statement, the prosecutor represented, over objection, that numerous telephone calls linked the telephones of Nichols and Dean during the time of the homicide.[61] The prosecutor relied on the December 3, 2006, report of Detective Blake. In Blake's January 15, 2007, report, however, Blake related that the number originally attributed to Nichols was in fact that of Jennisha Johnson, a friend of Dean. As a result, appellants claim, it was unreasonable for the prosecutor to rely on the erroneous report. However, the prosecutor gave his opening statement on December 12, 2006, before Blake's second report. Moreover, Brocchini testified that the number in question was Jennisha Johnson's cell phone number, that he had called her on that phone, and that it was not Nichols's number, contrary to what was stated in Blake's report.

(2) Appellants complain that Brocchini testified that Thomas White and Dupree Hull were associated with phone numbers found in Ruiz's cell phone records, and that the last call to Ruiz's cell phone was associated with White. Brocchini claimed that he relied on MPD records to link the telephone numbers, but subsequently admitted there were no such records and that documentation was limited to his handwritten notes. Those notes were not disclosed to the defense prior to trial. Appellants now say the failure of the

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61 In his opening brief, Dean says it was claimed that Nichols's telephone number appeared on Collins's phone record. While he does not provide us with record citations to any testimony or pertinent remarks by the prosecutor, he does quote the portion of the trial court's ruling on the new trial motions that dealt with the prosecutor's assertion, in opening statement, that Dean and Nichols made numerous telephone calls to other suspects in the case. Accordingly, we assume Dean's challenge is to the prosecutor's assertion concerning Nichols and *Dean*, not Collins.

prosecutor to give defense counsel the updated copy of Brocchini's report was a discovery violation, and Brocchini's conjecture that White and Hull were linked to the telephone numbers was without foundation. The record shows that, on cross-examination, counsel for Nichols asked what efforts Brocchini had made to link the telephone numbers obtained from Ruiz's cell phone. Brocchini responded that he ran them through a database in MPD. Brocchini conceded that, despite his 21 years of experience as a peace officer and his awareness of the reasons for writing reports, he did not provide one to the defense prior to trial, and in fact did not prepare a report until counsel requested one. Brocchini also admitted that when asked to back up the linkage between Hull and White and the numbers obtained from Ruiz's cell phone, he could not do so.[62]

(3) Appellants complain that Brocchini testified that White and Hull were Blood gang members, and he suggested appellants could have obtained Ruiz's home address from one of them. After trial, field identification cards and Brocchini's 1998 report were disclosed, identifying Hull as a member of the Crip faction of the Oak Street Posse. Appellants say this was a discovery violation, and Brocchini's testimony that White and Hull were Bloods was without foundation. They also say the prosecutor, having stated in court that he previously prosecuted Hull for murder, knew or should have known Hull was a Crip and not a Blood.[63]

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[62] At the hearing on the new trial motions, Brocchini testified that when he was preparing for his trial testimony, specifically cross-examination concerning telephone numbers found in the call log of Ruiz's cell phone, he saw some handwritten entries on one of his reports. Between his various testimony sessions, he was asked to do some research of MPD's database regarding the source of those notations. He discovered that the records, which were old, were gone. As a result, he gave what information he could remember from his investigation of the case, which had occurred approximately five years before his actual testimony.

[63] At the hearing on the new trial motions, Brocchini conceded that he testified at trial that Hull was a Blood, but in his 1998 report, Hull's name was on the Crip side of

(4) Appellants complain that in his closing argument, the prosecutor asserted that Dana Orent, the defense's gang expert, "defied police procedure" by stashing evidence in his garage. Appellants say the prosecutor misstated the evidence, because Orent did not "stash" evidence, but merely kept copies at his home for his own records. Appellants also note there was no evidence of police procedures, and they say the trial court erred by overruling their objection. In this regard, Orent testified that when he was asked by someone from MPD to review materials in connection with this case, he was no longer at the Pasadena Police Department. Orent termed himself "a pack rat" with respect to gang stuff, and explained that he had collected thousands of materials over the last 15 or 20 years. Whatever he would collect, including, for instance, photographs on the street, he would make copies of for his personal files. During the course of the prosecutor's closing argument, the following took place:

> "MR. MANER: … The evidence that came into the courtroom in this case was that Mr. Orent did not send an index of where the evidence came from …. If he had said that, it would be easy for the detective to know, okay, this picture comes from this report. Orent never did that. In fact, Orent defied police procedure –
>
> "MR. CHASE: Objection, Your Honor. Again. [¶] … [¶] [H]e is again testifying, Your Honor. There's no evidence Mr. Orent in any way, shape or form did not follow police procedure. None. [¶] … [¶]
>
> "THE COURT: The objection's overruled at this point[.] It's within the evidence presented at the trial. Go ahead, please.
>
> "MR. MANER: Okay. Police Procedure. Is it proper police procedure when you go on a search warrant and you find evidence, to take

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the OSP list. Brocchini explained that he had spoken to a lot of OSP gang members over the years, and that the older gangsters who had been around a long time were on the Blood side, while the younger ones who started coming up in around 1998 were on the Crip side. He knew that White was on the Blood side, and, because he thought about Hull as being one of the older members, was just going from memory and made a mistake.

it home and stash it in your garage? Okay? Do you need a course in police procedure to understand that? [¶] But that's what Mr. Orent did. He testified [–]

"MR. MILLER: Objection, that misstates the testimony.

"THE COURT: It's overruled.

"MR. MANER: He testified that he and his partner found a roll of film and they developed it and they took it and he has all – he kept it in his garage at home, or maybe it was in his living room, I forget, he kept it at home. And he had other evidence from other crime scene searches of gang members at home, he had his own personal gang file. The appropriate thing for police officer to do when you get evidence of a crime.

"MR. MILLER: Objection.

"MR. MANER: You book it into evidence.

"MR. MILLER: Now counsel's testifying.

"THE COURT: I think this is within the common experience and common sense. [¶] … [¶]

"MR. CHASE: He is misstating the evidence. Mr. Orent testified he made copies and put it in his file.

"MR. MANNER: Well, I guess we disagree about that, Judge. They'll decide ultimately.

"THE COURT: The objection is overruled. [¶] … [¶]

"[MR. MANER:] Lost track of where I was. But the gist of it is Orent didn't follow traditional police procedures in cataloguing and keeping evidence. So why is it a surprise to anybody that he would know something no one else would know about where this evidence of J Dogg and these pictures came from?… And he had his own personal stash of stuff."

(5) Appellants complain that during his closing argument, the prosecutor discussed why he decided not to use Orent as a prosecution witness at trial. Appellants say that, because no evidence was presented on this subject, the prosecutor offered his own unsworn testimony. They concede that the trial court sustained their objection, but

claim this was not an adequate remedy. In this regard, Nichols's attorney argued to the jury that Orent furnished materials to the district attorney's office in connection with this case, but the district attorney's office decided for some reason not to use him as an expert witness and instead chose to use someone with considerably less experience. When Orent complained, the prosecutor sent him a letter during trial and told him, inter alia, that Orent did not have permission to discuss the matter with anyone outside the district attorney's office.[64] In his closing argument, the prosecutor stated: "We heard a lot about our internal district attorney decision making process, which isn't in evidence, as far as whether we use Mr. Orent as a witness. And I'm not going to explain to you what decisions I make in terms of what experts I bring to court and what experts I don't, 'cause that's not something for you to focus on or consider about, and it's not evidence in this case. [¶] But use your common sense. If you have police agencies that are involved in a case and you call up a sister agency … and they say, Hey, we got a gang from your town that did a murder up here. Can you give us a cop to be a gang expert? Do you have someone who's an expert on this Pasadena gang? [¶] They go, Yeah, here's this guy, he works for us, he's our expert. At one point that was Dana Orent. The evidence shows he retired. He went out and now he's working for the defense attorneys, okay? In situations other than this one. So he's not free anymore. Police agencies will lend experts to other police agencies for free. We'll pay their hotel, we'll pay their travel and so forth, but we don't have to pay them thousands of bucks a day like Mr. Eisen here. [¶] So was there a shift in experts for accounting reasons, or to save money? That sounds like a logical reason as any." There was no objection from the defense until the prosecutor sought to

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64 In light of the letter, jurors were instructed: "If you find that the prosecutor told a witness not to speak with defense counsel, or attempted to dissuade any witness from talking with defense counsel, you can consider that fact in determining if the case has been proven beyond a reasonable doubt."

counter the perceived argument that the prosecution did not use Orent as a witness because Orent said Dean was not a gang member, by arguing that there was a duty to turn over exculpatory evidence, and that the defense would have asked Orent about that. The court told the prosecutor that it did not want to get into arguing the law outside the case, whereupon the prosecutor asked jurors what they thought the defense's first question to Orent would have been if Orent had had the opinion that Dean was not a gang member. Defense objections were sustained.

(6) Appellants complain that Brocchini erroneously testified that appellants repeatedly asked Collins where Ruiz lived. Appellants give no record citation to support this claim other than Trice's written new trial motion, which does not refer to the same pagination as the record on appeal. It is not this court's duty to comb the record for support for the parties' claims. We note, however, that on cross-examination, Dean's attorney asked Brocchini on what he based his testimony that Dean showed up with the others at Collins's house and asked where Ruiz lived. Counsel commented, "I missed that in [Collins's] testimony." Brocchini replied that he based it on Collins's testimony. Brocchini clarified: "I said they all four showed up and it was mainly Trice that was asking for the hookup to [Ruiz]. 'I want to buy dope from [Ruiz], where does [Ruiz] live.' [¶] But they were all there together, and they were all trying to make contact with [Ruiz]." Appellants are correct that Collins did not testify exactly as recalled by Brocchini. Collins did testify, however, that when appellants were at his house, hanging out and drinking, he and Trice talked about "basically, you know, how to get some dope, where to get it, what kind, when can I hook them up, when can I go get it." Collins testified that Trice asked him a few times to hook him up with someone who had a quarter kilo of drugs. Trice was "basically" asking Collins if Collins could hook them up with Collins's connection. Trice wanted to know "[w]hen and where, what time."

(7) Appellants complain that Brocchini testified that Lisa Young testified concerning Trice's status as a gang member.[65] Appellants contend Young did not so testify. They are correct; the question asked by the prosecutor and answered by Young was whether *Dean* ever told her he was a gang-banger.

(8) Appellants complain that Brocchini testified that Dean admitted he was a gang member when he was booked into the jail following his arrest in this case. Appellants say there was no documentation of any such admission. In reality, counsel for Dean asked Brocchini whether he recalled testifying *at the preliminary hearing* that it was his opinion Dean was a gang member based on an admission made by Dean to jail staff. When Brocchini said he recalled the testimony, counsel asked him the basis for that opinion. Brocchini responded that he believed the arresting officer told him that Dean made the statement. When counsel asked the name of the officer, Brocchini responded, "I don't know. *And that's why I never used it in my basis for opinion that he's a gang member in this jury trial*." (Italics added.) When defense counsel asserted Brocchini did so at the preliminary hearing so that Brocchini got Dean to trial on gang allegations, Brocchin responded, "Well, I stand by it. I was told by jail staff, or by an officer that booked him, that he said he was a gang member. And I – and I believe that happened. [¶] But you're asking who it was, I'm going to tell you I can't remember. And the person never wrote a report." Counsel then showed Brocchini a jail classification form signed by Dean, that Brocchini said he had never seen before. According to the form, Dean was asked by "S. Garcia," a clerk at the jail, whether he was affiliated with any gang. The checked box was "no." According to Brocchini, if Dean admitted to Garcia that he was a gang member, it would be on the form. Garcia was not the person who told Brocchini that Dean admitted being a gang member. Brocchini insisted that he was told

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65 Again, appellants provide no citation to the record supporting this assertion other than Trice's written new trial motion.

by someone and believed it, but he could not find any documentation for it and so did not rely on it at trial.

(9) Appellants complain that Brocchini testified that a certain telephone number (626-212-9466) was associated with Trice. Appellants say there was no documentation to support the claim. Brocchini testified, however, that he reviewed certain cell phone records. Voluminous telephone records were disclosed to the defense. On cross-examination, it was brought out that on one of his reports, Brocchini listed a pager number as 626-212-9566. Brocchini testified that the correct number was 626-212-9466. He based this on Collins calling it from his house. Brocchini explained that when he interviewed Tricia Lee on March 8, 2002, she gave the number as 626-212-9566. Collins, however, called 9466. Brocchini was then shown Collins's telephone bill and admitted he had made a mistake, as the number was not there. Nevertheless, he said he believed the correct number for Trice's pager to be 626-212-9466. He subsequently explained that he got that number from Dean's telephone bill. Tricia Lee gave him the pager number as 9566; he did not know whether she did so intentionally or accidentally, as she gave it to him from her memory. Then, on Dean's telephone bill, Brocchini found 12 calls to 9466, the same number except for one digit.

(10) Appellants complain that Brocchini testified that a certain photograph of Trice was taken following a 1995 Merced arrest. Appellants say that in reality, Trice's last arrest in Merced was in 1992. Again, we have not been cited to any testimony in this regard, nor are we told why, considering what the jury learned about Trice's criminal record, any such error was of any import.

(11) Appellants complain that Okamoto testified that Dean was arrested with Trice during a probation search. Appellants say Trice was not arrested at that time. Appellants have misread the record. In reality, Okamoto testified that Dean was seen entering a vehicle that then left a location law enforcement had under surveillance. The vehicle was stopped and Dean, who was a passenger, was arrested. Trice was also a

passenger in the vehicle. The subjects in the vehicle were detained while a search warrant was executed at Dean's residence. There was no testimony that Trice was arrested.

(12) Appellants complain that Okamoto testified that a getaway vehicle was parked several blocks from the Ruiz residence. Appellants argue there was no evidence to support this assertion. They overlook the fact that Brocchini testified, earlier in the trial, that the trail of evidence was consistent with a getaway car being parked about a block from the Ruiz home. Moreover, the trial court admonished the jury that Okamoto's testimony concerned the predicate acts and not the charged offenses, and that Okamoto was not there to make the jury's decision as to whether or not certain things happened. The court also told jurors that if there was a question about whether the opinion was based on matters that actually did come into evidence, they could check the court reporter's record during deliberations.

(13) Appellants complain that Okamoto incorrectly testified that Trice had been convicted in 1995 for sale of cocaine base. Appellants note that the conviction was removed from the predicate acts chart, but complain that jurors were never admonished. Appellants do not cite us to where Okamoto actually testified about the conviction, although it is apparent from a discussion among counsel that took place outside the jury's presence, that the predicate acts chart had on it a drug conviction out of Los Angeles County to which Trice objected. As best we can determine, the prosecutor asked whether Okamoto was aware of a prior conviction of Trice that happened in Merced County in 1995, but the trial court ruled that the document being relied on was not necessarily one that an expert would rely on in forming an opinion. On cross-examination, Trice himself admitted to having suffered a conviction in 1995 for possession for sale of cocaine base. In any event, although Trice's attorney said he thought somebody testified in front of the jury concerning the erroneous conviction, he also said he would take care of it in his own way.

(14) Appellants complain that the prosecution failed to disclose, until after trial, Brocchini's 1998 report, listing Collins as a member of the Blood faction of the Oak Street Posse criminal street gang.

b. *Analysis*

With respect to alleged prosecutorial misconduct in general, "'[a] prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.]" (*People v. Hoyos, supra*, 41 Cal.4th at p. 923.) A showing of bad faith is not required. (*Id*. at p. 924, fn. 36.) "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Ochoa, supra,* 19 Cal.4th at p. 427.)

With regard specifically to the presentation of, or failure to correct, false or misleading testimony, "'[u]nder well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted.' [Citations.] Put another way, the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading. [Citations.] This obligation applies to testimony whose false or misleading character would be evident in light of information known to the police involved in the

criminal prosecution [citation], and applies even if the false or misleading testimony goes only to witness credibility [citations]. Due process also bars a prosecutor's knowing presentation of false or misleading argument. [Citations.] As [the California Supreme Court has] summarized, 'a prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process.' [Citation.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 716-717; accord, *Napue v. Illinois* (1959) 360 U.S. 264, 269.) "When the prosecution fails to correct testimony of a prosecution witness which it knows or should know is false and misleading, reversal is required if there is any reasonable likelihood the false testimony could have affected the judgment of the jury. This standard is functionally equivalent to the 'harmless beyond a reasonable doubt' standard of *Chapman*[, *supra*,] 386 U.S. 18. [Citation.]" (*People v. Dickey*, *supra*, 35 Cal.4th at p. 909, italics omitted.)

We have already discussed the testimony concerning Collins's gang status, *ante*, and decline to revisit it here. Assuming false testimony was presented, we see no reasonable likelihood it could have affected the judgment of the jury, for the reasons stated in connection with appellants' claim of *Brady* error. This is so even assuming the

claim here is one of intentional misconduct. (See *People v. Hoyos, supra,* 41 Cal.4th at p. 924, fn. 36.)

We have examined the record and conclude appellants have greatly overstated the effect of the remaining alleged errors. With the exception of Brocchini's testimony that Hull was a Blood and the prosecutor's argument concerning Orent, which we discuss *post*, either there was no actual error or the errors were of little import, whether considered individually or cumulatively. Prosecutorial misconduct in an opening statement is rarely grounds for reversal (see *People v. Wrest* (1992) 3 Cal.4th 1088, 1108; *People v. Harris* (1989) 47 Cal.3d 1047, 1080, disapproved on other grounds in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10); here, the prosecutor's misstatement with

respect to the telephone calls was cured by the actual testimony on the point. Moreover, the trial court's instructions (which were given both before opening statements and again before closing arguments and which referred expressly and specifically to those statements and arguments), that jurors could use only the evidence presented in the courtroom in deciding the facts and that nothing the attorneys said was evidence, were sufficient to dispel any prejudice. (See *People v. Hinton, supra,* 37 Cal.4th at p. 863.) The alleged errors that occurred during testimony were, almost without exception, corrected in front of the jury, or, when the claim was lack of foundation or documentary support for the testimony, that lack was brought to jurors' attention. While the prosecutor's duty to correct false or misleading testimony may not be discharged merely because defense counsel knows of, and the jury may discern, the error (*U.S. v. LaPage* (9th Cir. 2000) 231 F.3d 488, 491-492; but see *People v. Ervin* (2000) 22 Cal.4th 48, 91-92), it would be illogical to conclude an error prejudiced a defendant merely because defense counsel, and not the prosecutor, was responsible for the error being corrected. What matters, in terms of potential harm, is whether the error was in fact corrected for the jury. The errors were corrected in the present case; moreover, a number of appellants' claims concern evidence presented in support of the gang allegations. The gang enhancements were stricken by the trial court in its ruling on appellants' new trial motions, and appellants fail to persuade us that this remedy was inadequate.

As for the erroneous testimony that Hull was a Blood, which was not corrected in front of the jury, appellants assert that Brocchini suggested appellants could have obtained Ruiz's home address from White or Hull, and not from Collins. The actual testimony was not nearly as clear on this point as appellants would have us believe. The prosecutor elicited from Brocchini that it was obvious to police Ruiz was a fairly prolific drug dealer and gang member. When the prosecutor asked whether that was common knowledge among people who were gang members, drug dealers, or customers, the trial court sustained a defense objection and directed the prosecutor to lay additional

foundation. The prosecutor then asked whether, based on Brocchini's experience in narcotics cases and what he knew about Ruiz, Brocchini had an opinion as to whether Blood gang members or Nortenos out on the street would likely know that Ruiz would be a good source of rock cocaine. The trial court sustained a defense objection. The prosecutor then asked whether Brocchini was familiar with Ruiz's character as a drug dealer from 1995 to 2002. Brocchini said he was, and testified that Ruiz was not an "undercover drug dealer," but instead flaunted the fact, driving a red Northstar Cadillac all over town and dressing in nice clothes. The prosecutor then asked whether Blood gang members would know that. The defense's objection, that the question called for speculation, was sustained. The prosecutor elicited that a lot of people in town who were involved in drugs or gangs were aware that Ruiz was a drug dealer. When he asked about Blood gang members coming from out of town and asking around for a good source, however, the trial court again sustained an objection that the question called for speculation. The prosecutor was permitted to elicit that Pasadena Bloods would associate with Modesto Bloods, as gang members from different towns often get to know each other in custodial settings, but another objection based on the question calling for speculation was sustained when the prosecutor sought to ask whether, if out-of-town gang members were in town looking for a narcotics source, Ruiz's name would come up. The prosecutor then left the subject.

It is apparent that the prosecutor was attempting to suggest appellants could have obtained Ruiz's home address from a source other than Collins, but it is equally apparent he was unsuccessful. The implication was contained in his questions, not Brocchini's answers, and jurors were instructed that questions were not evidence and not to assume something was true just because an attorney asked a question suggesting it was true. "Jurors are presumed to understand and follow the court's instructions. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 662.) In light of the actual testimony and the evidence a number of people in town who were involved in drugs or gangs were aware

Ruiz was a drug dealer, there is no reasonable likelihood any false impression created by Brocchini's testimony that Hull was a Blood could have affected the judgment of the jury, especially in light of Brocchini's admission that he could not back up the linkage between names and the numbers found in Ruiz's cell phone. (See *People v. Dickey, supra,* 35 Cal.4th at p. 910.) Appellants' claim the prosecutor knew or should have known Hull was a Crip does not help them; the record shows the prosecutor stated, without contradiction, that the case in which he prosecuted Hull for murder was not a gang-related case, and so he did not know whether Hull was a Crip or a Blood. We will not assume the prosecutor was lying.

We turn now to the prosecutor's argument concerning Dana Orent. "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 823.) A prosecutor "'may "vigorously argue his case"'" (*People v. Welch, supra,* 20 Cal.4th at p. 752), but "[a] prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.' [Citation.]" (*People v. Hill*, *supra*, at p. 823.)

We think there can be little doubt the prosecutor crossed the line from proper to improper argument when he asserted that Orent took evidence home and stashed it in his garage. Even assuming some aspects of traditional police procedure might fall within the realm of common experience, the prosecutor here completely misrepresented Orent's testimony by asserting that Orent took, kept, and withheld evidence. In reality, as defense counsel pointed out, Orent clearly testified that he made and kept *copies* in his files, and nothing in the record suggested otherwise. The prosecutor erred by making the argument, and the trial court erred by overruling the defense objections to it. We fail to see how appellants were prejudiced, however, since the prosecutor's misstatements concerned a witness and testimony that were relevant only to the stricken gang

allegations.

With respect to the prosecutor's statements concerning why he did not use Orent as a witness, the record shows appellants did not initially object to the argument, nor, when they did object, was it on the ground the prosecutor was offering unsworn testimony. Accordingly, the issue has not been preserved for appeal. (See *People v. Ochoa, supra,* 19 Cal.4th at p. 427.) In any event, the prosecutor himself pointed out that why he used certain witnesses was not in evidence and was not something for jurors to consider, and, again, the argument concerning Orent only affected the gang allegations. There was no prejudice.

D. Restriction on Nichols's Argument to the Jury

Nichols and Trice contend the trial court committed federal constitutional error by excluding a portion of Nichols's argument to the jury. We conclude that any error was harmless.

1. Background

During his examination of Dr. Eisen, the defense expert on eyewitness memory and suggestibility, counsel for Nichols elicited that Eisen was aware of case studies involving situations in which people were convicted of crimes based on eyewitness identification, then were subsequently exonerated following DNA testing. Eisen described two bodies of data on the subject.

Counsel for Nichols subsequently argued to the jury that justice must be colorblind, and that jurors could not fill in the blanks for the prosecutor simply because Nichols might be a Black gang-banger from Pasadena. This ensued:

> "[MR. CHASE:] People are convicted falsely. John Gresham [*sic*] wrote a book –
>
> "MR. MANER: Objection, this is improper argument, judge.
>
> "THE COURT: Sounds like it, Mr. Chase.

"MR. CHASE: No, it isn't, Your Honor. I can give you case authority, we're allowed to argue things that are relevant and before the people. And this is something that is common knowledge that the book is out –

"MR. MANER: Oh, Judge, some, some fictional book that's –

"MR. CHASE: It's not fictional, sir.

"MR. MANER: Or that is not in evidence in this case, Judge, is inappropriate.

"THE COURT: Mr. Chase, I'm going to sustain the objection. I don't think that novels are relevant.

"MR. CHASE: It's not a novel, Your Honor.

"THE COURT: Well, the objection is sustained.

"MR. CHASE: This is not a novel.

"THE COURT: It's sustained.

"MR. CHASE: Innocent people are convicted. Oftentimes those convictions are caused when officers have arrived at a conclusion and do the investigation based on the conclusion and not the evidence. They oftentimes do this, but with people that aren't particularly likeable. Gang-bangers. People who have mental problems. These are the easy targets.

People can come within – you know, you can have literally execution dates have been set –

"MR. MANER: Again, Your Honor, this is another inappropriate argument.

"THE COURT: That's sustained.

"MR. CHASE: Innocent people are convicted. If you have these toxic elements present a little falsehood. Conclusion-based investigation. I believe in this system. I really do. It is the essence of what this country is all about. I was raised that way. My father fought in two wars –

"MR. MANER: Objection, Judge, Counsel's personal experiences, his family experiences, his personal opinion, is all irrelevant in a closing argument.

"THE COURT: I'm going to sustain that.

"MR. CHASE: This, ladies and gentlemen, is what makes our country great and worth fighting for. The quality [*sic*] under the law and the opportunity to have each one of you decide this case based on the law without prejudices."

Counsel for Nichols filed a written objection to the restriction on his argument, citing case authority supporting his claim that he should have been allowed to discuss John Grisham's book The Innocent Man (2006). The trial court declined to change its ruling.

2. Analysis

"[C]losing argument for the defense is a basic element of the adversary factfinding process in a criminal trial" and the complete denial of an opportunity to make a closing argument is a violation of the constitutional right to counsel. (*Herring v. New York* (1975) 422 U.S. 853, 858-859, 863.) Similarly, a defendant's right to counsel is denied where the court seriously limits defense closing argument, as by precluding reference to an entire theory of defense (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739) or not allowing counsel to argue the significance of evidence critical to a theory of defense (*United States v. Kellington* (9th Cir. 2000) 217 F.3d 1084, 1099-1100). "This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion. [Citations.]" (*Herring v. New York, supra,* 422 U.S. at p. 862; see *People v. Holloway* (2004) 33 Cal.4th 96, 137.)

It has been stated that "[c]ounsel's summation to the jury 'must be based solely upon those matters of fact of which evidence has already been introduced or of which no

evidence need ever be introduced because of their notoriety as judicially noticed facts.' [Citations.] He may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature. [Citations.]" (*People v. Love* (1961) 56 Cal.2d 720, 730, disapproved on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2.) Appellants point to a number of cases that have found particular magazine and newspaper articles to be appropriate subjects for closing argument. (See, e.g., *People v. West* (1983) 139 Cal.App.3d 606, 610-611; *People v. Guzman* (1975) 47 Cal.App.3d 380, 392, disapproved on other grounds in *People v. McDonald* (1984) 37 Cal.3d 351, 362, fn. 8; *People v. Woodson* (1964) 231 Cal.App.2d 10, 15-16; *People v. Travis* (1954) 129 Cal.App.2d 29, 37-39.) While reflecting particularized exercises of judicial discretion under specific circumstances, these decisions do not stand for the proposition that attorneys may *always* refer to such items in closing argument. The trial court still retains discretion pursuant to section 1044 to limit counsel's argument under the circumstances of each case.[66] (See *People v. London* (1988) 206 Cal.App.3d 896, 909.) "Counsel's summation to the jury must be based upon facts shown by the evidence or known judicially. [Citation.] Counsel may refer the jury to nonevidentiary matters of common knowledge, or to illustrations drawn from common experience, history, or literature [citation], but he may not dwell on the particular facts of unrelated, unsubstantiated cases." (*People v. Mendoza* (1974) 37 Cal.App.3d 717, 725 [trial court properly precluded defense counsel from reading newspaper clipping about unrelated crimes, hearsay material that could only confuse jury with irrelevant facts]; see also *People v. Sanders, supra*, 11 Cal.4th at pp. 554-555 [trial court properly precluded

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66 Section 1044 provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

references to "notorious but unrelated" Manson case, but allowed defense counsel to argue in general terms that there were "'worse cases'" than defendant's in terms of number of victims and nature of crime]; *People v. Pelayo* (1999) 69 Cal.App.4th 115, 122 [trial court properly restricted defense counsel's closing argument by prohibiting references to newspaper articles about individual who was acquitted of sex crimes against children when it was discovered children had fabricated their stories].)

Here, the trial court precluded defense counsel from citing to a particular book about an unrelated case and to his father's personal experiences, but did not limit counsel's argument on the crux of the defense theory: that people are wrongly convicted, and that appellants were equal under the law and had the right to a jury decision based on the law and not on prejudices. Counsel was thus allowed to fully address the relevant defense theory "in his own words without reference to supporting authorities." (*People v. Guzman, supra*, 47 Cal.App.3d at p. 392.) We find no abuse of discretion or denial of the right to counsel or to present a defense (see *People v. Holloway, supra*, 33 Cal.4th at p. 137; *People v. London, supra*, 206 Cal.App.3d at p. 909); moreover, were we to find error, it necessarily would be harmless (*People v. Guzman, supra*, at p. 392).

V

SENTENCING ISSUES

A. Firearm Discharge Enhancements

Appellants contend the firearm discharge enhancements must be stricken for failure of proof. We agree with respect to Nichols, but disagree with respect to Dean and Trice.

1. Background

As previously described, firearm discharge enhancement allegations, pursuant to

section 12022.53, subdivisions (b), (c), (d) and (e)(1),[67] were charged and found true with respect to counts I, III, and IV. At sentencing, the prosecutor observed that subdivision (e)(1) was rendered inapplicable by the trial court's having struck the gang enhancements, but that subdivision (d) still resulted in an enhancement of 25 years to life. As a result, the trial court struck the enhancements alleged pursuant to subdivision (e)(1), but imposed sentence pursuant to subdivision (d).

No one objected to imposition of sentence under subdivision (d). Appellants now contend, however, that with the gang findings stricken, imposition of enhancements pursuant to subdivision (d) was unauthorized, as the evidence is insufficient to establish personal firearm discharge causing death or great bodily injury by each, or any, appellant.[68]

2. Analysis

"'The legislative intent behind section 12022.53 is clear: "The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime."' [Citations.]" (*People v. Palacios* (2007) 41 Cal.4th 720, 725.) To this end, and in recognition of different degrees of culpability, section 12022.53 imposes three gradations of punishment based on the seriousness of the type and consequences of the firearm use. (*People v. Grandy* (2006) 144 Cal.App.4th 33, 42.) The portions of section 12022.53 pertinent to the issue raised by appellants provide:

> "(d) Notwithstanding any other provision of law, any person who, in the commission of [murder (subd. (a)(1)) or robbery (subd. (a)(4))] …, personally and intentionally discharges a firearm and proximately causes

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[67] When we hereafter refer to subdivisions (a), (b), (c), (d) and (e)(1), we are referring to those subdivisions of section 12022.53.

[68] Failure to object to an unauthorized sentence does not result in forfeiture of the issue for purposes of appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

> great bodily injury …, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.
>
> "(e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved:
>
> "(A) The person violated subdivision (b) of Section 186.22.
>
> "(B) Any principal in the offense committed any act specified in subdivision … (d)."

Under the statute, a nonshooter cannot be subjected to enhanced punishment under subdivision (d) absent a gang finding under section 186.22, subdivision (b). This does not mean, however, that a *shooter* must *personally inflict* great bodily injury or death in order to be liable in the absence of a gang finding. While a subdivision (d) enhancement may most commonly be imposed where a bullet fired by the defendant strikes the victim (see *People v. Zarazua* (2008) 162 Cal.App.4th 1348, 1361), the plain language of subdivision (d) does not compel such a result, but instead requires that the shot fired by the defendant be a *proximate cause* of great bodily injury or death. In other words, the shooter need not *personally* cause great bodily injury or death, but instead need only *proximately* cause such a result.

It has been held that "a defendant can proximately cause injury by discharging a firearm within the meaning of section 12022.53, subdivision (d) *even if his or her bullet does not actually strike the victim*." (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1150.) We agree.

People v. Bland (2002) 28 Cal.4th 313 (*Bland*) is instructive. In that case, the defendant and a companion shot at a car containing three individuals, killing one and injuring the other two. Despite the fact the evidence was not clear who fired the shots that struck the two survivors, the defendant was convicted of murder and two counts of

attempted murder, and jurors found true a subdivision (d) allegation with respect to all counts. (*Bland*, *supra*, at p. 318.)

The California Supreme Court held that the trial court had a sua sponte duty to define proximate causation, as the term has a technical meaning peculiar to the law. (*Bland, supra,* 28 Cal.4th at p. 334.) It approved jury instructions stating that (1) "'[a] proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred'" (CALJIC No. 17.19.5), and (2) when the conduct of two or more persons contributes concurrently as a cause of the great bodily injury or death, the conduct of each is a cause of the great bodily injury or death if that conduct was a substantial factor contributing to the result, and a cause is concurrent if it was operative at the moment of the great bodily injury or death and acted with another cause to produce that result (CALJIC No. 3.41). (*Bland*, *supra*, at pp. 335, 336.)

In concluding that CALJIC No. 17.19.5 correctly defines proximate causation, the court rejected the determination by the Court of Appeal majority that the instruction was not a proper definition because it "'would permit a true finding on the enhancement based [on] the cohort's inflicting the death and injuries and defendant's aiding and abetting him simply by also firing a gun. The enhancement cannot be found true unless defendant personally fired the bullets which struck the victim.'" (*Bland, supra,* 28 Cal.4th at p. 335.) The Supreme Court stated: "Section 12022.53(d) requires that the defendant 'intentionally and *personally* discharged a firearm' …, but only that he 'proximately caused' the great bodily injury or death. The jury, properly instructed, reasonably found that defendant did personally discharge a firearm. The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things." (*Bland, supra*, at p. 336.) The court concluded: "A person can proximately cause a gunshot injury without personally firing the weapon that discharged

the harm-inflicting bullet.… [¶] … [S]ection 12022.53(d) does not require that the defendant fire a bullet that directly inflicts the harm. The enhancement applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*Bland*, *supra*, at pp. 337, 338; see, e.g., *People v. Carrillo* (2008) 163 Cal.App.4th 1028, 1036-1038 [although trial court erred by instructing that subd. (d) allegation was true if conduct of defendant or coperpetrator harmed victim but then failing to instruct that concurrent causes could operate together to determine proximate cause, allegation could be found true under circumstances where defendant was one of several persons who shot at victim, victim was struck by rounds fired from more than one gun, and there was no evidence defendant fired one of those guns]; *People v. Zarazua, supra,* 162 Cal.App.4th at pp. 1351, 1361-1362 [subd. (d) allegation properly found true where victim was killed in traffic collision that occurred when car in which he was riding was hit by car carrying two members of one gang, who were fleeing because of gunfire from car carrying members of rival gang, including defendants]; *People v. Palmer*, *supra*, 133 Cal.App.4th at p. 1145, 1149-1150 [subd. (d) allegation properly found true where police officer sustained broken ankle while diving for cover from shots fired by defendant, who, with his companion, was attempting to flee the scene after committed an armed robbery].)

In light of the foregoing, we have no trouble concluding that, when multiple gunmen shoot at a victim who is effectively trapped inside a small enclosed area such as a closet, and the victim is significantly injured or killed, all of the gunmen have proximately caused great bodily injury or death within the meaning of subdivision (d), regardless of whether it can be determined that any particular shooter or shooters personally fired the injurious or fatal shot or shots, and regardless of whether bullets fired by any particular shooter actually struck the victim. The question in the present case, then, is whether the evidence is sufficient to establish that any particular appellant or

appellants personally and intentionally discharged a firearm at Ruiz.

Whether a defendant personally and intentionally discharged a firearm in the commission of an enumerated offense is a question for the trier of fact to decide. (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1007.) The standard of appellate review applicable to such a question is settled. The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson, supra,* at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125), and applies to enhancements as well as convictions (*People v. Wilson* (2008) 44 Cal.4th 758, 806).

Viewed in accordance with the foregoing principles, the evidence showed that appellants were three of the four intruders T. saw in her home on the evening of March 3, 2002. All were armed. Although T. could not positively identify any of the guns, given where guns were found after the shooting and T.'s testimony that they looked similar to the weapons she saw that night, a reasonable inference can be drawn that Trice had the .22-caliber rimfire revolver, Dean had the Lorcin .380 semiautomatic, and Nichols had a big black gun that was never found because he took it with him after the shooting.

T.'s testimony established that appellants all had their guns in their hands prior to

the shooting. There was no evidence their guns ever left their hands until after Ruiz was shot. Trice and Nichols forced Ruiz to the walk-in closet in the bedroom. T. saw Trice at the entrance of the closet door. She lost sight of Ruiz at the closet door. Trice and Nichols took Ruiz into the closet. Through the half-open door, T. could see the back of Nichols's shirt inside. Although she could not see whether there was anyone in the closet besides Ruiz and Nichols, since T. did not see Trice anywhere, it can reasonably be inferred he was inside the closet when the shooting started.

When the gunfire erupted, T. saw Dean go to the closet door and start shooting into the closet at a downward angle, using a gun that appeared similar to the Lorcin .380 that was subsequently found. She witnessed, she estimated, at least four shots going into the closet door. When Dean paused after firing a few shots, T. could hear other shots going off behind the door. It can reasonably be inferred that Trice was inside the closet, shooting, as four .22-caliber bullets from rimfire cartridges were recovered from Ruiz's body, and Ruiz's blood was on the cylinder of the .22-caliber revolver. Ruiz was shot many more times than the number of bullets recovered, however.

In light of the foregoing, there is ample evidence to support the subdivision (d) enhancements as to Dean and Trice, even without the gang findings. Although appellants attack T.'s and Collins's testimony, their credibility was for the jury to determine. There being substantial evidence to support a conclusion Dean and Trice, in the commission of robbery and murder, personally and intentionally discharged a firearm, proximately causing great bodily injury or death to a person who was not an accomplice, it necessarily follows the trial court did not err in sentencing accordingly, notwithstanding the fact the subdivision (e)(1) allegations and gang enhancements were stricken. As to Dean and Trice, then, the subdivision (d) enhancements stand.

However, substantial evidence does not support the subdivision (d) enhancements as to Nichols. After the shooting stopped, T. found Ruiz's gun on the floor of the closet. The gun appeared to have malfunctioned, but she grabbed it and went to Ruiz, who by

now was outside. The gun, a nine-millimeter semiautomatic, was found next to Ruiz's body when police arrived. Inside the closet was an expended nine-millimeter shell casing from the same manufacturer as the nine-millimeter cartridges in the gun's magazine. From this, together with T.'s testimony that Ruiz kept a Taurus nine-millimeter semiautomatic pistol in the safe inside the closet, it can reasonably be inferred that Ruiz either was armed when appellants accosted him outside the house, or, as seems more likely, he obtained his gun from the safe once he was inside the closet. Once inside the closet, he managed to get off a shot before the gun jammed. Regardless of who shot first, gunfire erupted. Nichols was in the closet with Ruiz at the time. While it would defy logic to assume that he just stood by in the middle of a shootout, holding his gun but not firing it, that conclusion does not substitute for evidence. Nothing in the record demonstrates that Nichols actually fired his gun. Accordingly, as to Nichols, the subdivision (d) enhancements on counts I, III, and IV must be reversed for insufficiency of the evidence.[69]

This being the case, sentence must now be imposed on the subdivision (b) enhancements that were alleged and found true on counts I, III, and IV. Subdivision (b) requires only the personal use of a firearm, not its discharge. "Simple firearm use may include the threatening display of a gun or its use as a cudgel. Discharge of a firearm requires that the weapon actually be fired. [Citations.]" (*People v. Palacios, supra,* 41 Cal.4th at p. 725, fn. 3.) There is clearly sufficient evidence that Nichols personally used a firearm in commission of the charged robberies and murder (see, e.g., *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1059; *People v. Berry* (1993) 17 Cal.App.4th 332, 335-339), and Nichols does not contend otherwise.

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69 By parity of reasoning, the subdivision (c) enhancements on those counts must also be reversed as to Nichols, as they also require a showing that he "personally and intentionally discharge[d] a firearm."

B. Order of Restitution to City of Modesto

Pursuant to section 1203.1, the trial court ordered appellants to pay restitution to the City of Modesto in the amount of $236.04 for emergency response costs, and to be jointly and severally liable therefor.[70] Appellants now contend the order was unauthorized and must be stricken. Respondent properly concedes the issue.

Subdivision (e) of section 1203.1 permits a trial court to order a defendant to make restitution to a public agency for costs of emergency response *as a condition of probation*. As appellants were manifestly not granted probation, an order of restitution cannot lawfully be imposed on them pursuant to section 1203.1.

Section 1202.4 provides for the payment of restitution by a defendant to a crime victim who incurs economic loss. (See § 1202.4, subd. (a)(1).) We apply the statute as it read in 2002, when appellants committed their crimes. (*People v. Martinez* (2005) 36 Cal.4th 384, 389.) Subdivision (f) of section 1202.4 provided: "In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims …." In order for a governmental subdivision, agency, or instrumentality to be considered a "victim" for purposes of the statute, however, that entity had to be "a direct victim of a crime." (*Id*., subd. (k)(2).) A "direct victim" is an entity against which a crime has been committed or that is the immediate object of the offense. (*People v. Martinez, supra,* 36 Cal.4th at p. 393; *People v. Birkett* (1999) 21 Cal.4th 226, 232-233.) Under this definition, the City of Modesto was not a direct victim of appellants' offenses

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[70] The trial court's written order cites section 1203.11. This is clearly a typographical error, as section 1203.11 concerns service of process, regarding a temporary restraining order or other protective order, by a probation or parole officer.

(see *People v. Martinez*, *supra*, at p. 394, fn. 2 [fire department incurring labor costs to fight fire was not direct victim of crime of unlawfully causing a fire]); hence, restitution could not lawfully be ordered to the city under section 1202.4. As the order constitutes an unauthorized sentence (see *People v. Scott*, *supra*, 9 Cal.4th at p. 354), we will order it stricken.

VI

CUMULATIVE PREJUDICE

With respect to every issue not concerning disclosure of the confidential informant or alleged sentencing error, appellants contend that, even if not prejudicial by itself, the error was prejudicial in the context of all the trial errors. They say the trial errors cumulatively denied them their rights to due process, to present an effective defense, and to a fundamentally fair trial.[71]

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing [of prejudice]. [Citations.] Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845.) We have examined the entire record and are persuaded that what errors we have identified were not prejudicial by themselves. We are also persuaded that their combined effect was harmless, and that appellants received a fair trial. (See *People*

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[71] The briefing on this issue violates California Rules of Court, rule 8.204(a)(1)(B), which requires that each brief state each point under a separate heading or subheading, by simply adding a paragraph asserting cumulative prejudice where applicable. In two instances, Nichols's opening brief asserts the errors cumulatively denied appellant *Lopez* his constitutional rights. We will address the issue on the merits to forestall a claim of ineffective assistance of appellate counsel.

v. Boyette (2002) 29 Cal.4th 381, 467-468.) In so holding, and given the nature and number of the charges and enhancement allegations and the fact there were three defendants, we expressly reject Nichols's oft-repeated suggestion that juror deliberations of approximately seven hours somehow indicates a close case such that any error was prejudicial. (See, e.g., *People v. Taylor* (1990) 52 Cal.3d 719, 732 [rejecting notion, in light of number of charges and allegations, that deliberations of 10 hours showed case was close]; *People v. Walker* (1995) 31 Cal.App.4th 432, 437 [same re: deliberations of six and one-half hours].)

We reach this conclusion despite the fact jurors were exposed to behavior, from both the prosecutor and defense counsel, that cannot have given them a good picture of the legal profession or the criminal justice system. The prosecutor often seemed incapable of restraining himself from including gratuitous remarks with virtually every objection he made or to which he responded. Defense counsel – some more than others – were frequently rude and sarcastic toward the prosecutor and, worse, toward witnesses. "[I]t is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts …. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge – his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case." (*Sacher v. United States* (1952) 343 U.S. 1, 9.) Despite counsel's behavior, however, we remain convinced appellants were not denied a fair trial or any other constitutional rights.

DISPOSITION

In *People v. Tommy Jackson Nichols* (Super. Ct. Stanislaus County, 2008, No. 1038145), the judgment of conviction is affirmed. The section 12022.53, subdivision

(c) and (d) enhancements are reversed as to counts I, III, and IV, and the order of restitution to the City of Modesto is stricken. Sentence is vacated, and the trial court is directed to resentence Nichols in accord with the views expressed in this opinion.

In *People v. Jermaine Michael Dean* (Super. Ct. Stanislaus County, 2008, No. 1037386), the order of restitution to the City of Modesto is stricken. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting said modification, and to forward a certified copy of same to the appropriate authorities.

In *People v. Kevin Laquan Trice* (Super. Ct. Stanislaus County, 2008, No. 1037967), the order of restitution to the City of Modesto is stricken. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting said modification, and to forward a certified copy of same to the appropriate authorities.

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Ardaiz, P. J.

WE CONCUR:

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Levy, J.

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Dawson, J.